Oct 27 1871
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3-116

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~232.~~ 87

THE HOME INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF AUGUSTA, GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED AUGUST 28, 1871.

Oct 26 1876

Returned
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SUPREME COURT OF THE UNITED STATES.

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1 STATE OF GEORGIA,
Richmond County:

In Richmond superior court. In equity.

THE HOME INSURANCE COMPANY OF NEW York
vs.
THE CITY COUNCIL OF AUGUSTA, GEORGIA.
} Bill for injunction and relief.

Upon hearing had in above-stated case on the bill and answer therein, and amendments thereto, before his honor Judge Wm. Gibson, judge of said court, on the eighteenth of April, 1874, the following decision was rendered by his honor on the ninth of May, 1874, to wit:

AUGUSTA, *May 9th*, 1874.

Since the hearing in this cause I have been too much engaged to examine fully all the questions involved; and as I see no opportunity soon of fully preparing an opinion in the same, to give the parties an early hearing in the supreme court, where I am almost absolutely certain it will be carried, as people seem now to think nothing is settled, the injunction prayed is refused for the reason that all taxable property or things taxed by the State and not exempted specially are taxable by the city.

WM. GIBSON,
Judge Sup. Court.

2 And now, upon the twelfth day of May, 1874, comes the Home Insurance Company of New York, by its solicitor, Salem Dutcher, and excepts to said decision as error, and for cause of exception says:

First. That the court erred in deciding that an incorporated company is taxable property under the law of the State of Georgia.

Second. That said decision, as stated therein, is not made on a full examination of all the questions involved; and,

Third. That said decision is contrary to law.

And so the Home Insurance Company of New York, by its solicitor, Salem Dutcher, prays the court to certify this its bill of exceptions.

SALEM DUTCHER,
Complt's. Solr.

3 I do hereby certify that the foregoing contains a correct and full statement of the case as heard before me, and a correct statement of the errors complained of. The clerk of the superior court is hereby ordered to make a full transcript of all the proceedings in said case, and forward the same to the present supreme court, that the errors complained of may be examined and heard in said court.

WM. GIBSON,
Judge Sup. Court.

Service of the within acknowledged.
May 18th, 1874.

J. C. C. BLACK,
City Atty.

Filed in office May 19th, 1874.

Z. D. HARRISON, *Clk.*

4 In Richmond superior court.

THE HOME INSURANCE COMPANY OF NEW YORK
vs.
THE CITY COUNCIL OF AUGUSTA. } Bill for injunction.

STATE OF GEORGIA,
Richmond County:

To the honorable William Gibson, judge of the superior court of said county, having and exercising jurisdiction in equity therein:

Your orator, the Home Insurance Company of New York, brings this bill against the city council of Augusta for injunction, and sheweth that your orator is a private corporation, incorporated under the laws of the State of New York to transact the business of fire insurance, and that your orator was, upon the first day of January, eighteeen hundred and seventy-four, and has since continuously been, and now, for and during the year (1874) eighteen hundred and seventy-four, and at the option of your orator for the further space of sixty days from
5 and after the first day of January, eighteen hundred and seventy-five, is authorized under an act of the general assembly of the State of Georgia, entitled "An act to regulate insurance business and insurance agencies in the State of Georgia," approved on the nineteenth day of March, in the year eighteen hundred and sixty-nine, and commonly known as the insurance act, to transact, by itself or agents, the business of insurance in the State of Georgia, and that pursuant to said authorization your orator was, upon the said first day of January, eighteen hundred and seventy-four, and hath since continuously been and now is, engaged in transacting said business in the city of Augusta, in the State and county first aforesaid.

And further sheweth your orator, that the city council of Augusta is a municipal corporation, created by and existing under the laws of the State of Georgia, in said county of Richmond, for certain purposes set forth in the charter of said corporation, and having certain powers set forth in said charter and none other powers, and that upon the fifth day of January, eighteen hundred and seventy-four, said city council made and established a certain ordinance, which ordinance was,
6 upon the seventh day of January, (1874,) eighteen hundred and seventy-four, by order of said city council, published in the Chronicle and Sentinel, a newspaper published in said city of Augusta, and as so published is in the words and figures following, to wit:

"An ordinance to amend an ordinance entitled 'An ordinance to assess and levy taxes for the support of the municipal government of Augusta,' etc."

"SECTION I. Be it ordained by the city council of Augusta, and it is hereby ordained by the authority of the same, that from and after the passage of this ordinance the annual license-tax on insurance companies shall be as follows: 1. On each and every life-insurance company located, having an office, or doing business within the city of Augusta, one hundred dollars. 2. On each and every fire, marine, or accidental insurance company located, having an office, or doing business within the city of Augusta, two hundred and fifty dollars.

"SECTION II. Be it further ordained, that the annual license-tax on each and every stock-yard in the city of Augusta shall be fifty dollars.

"SECTION III. And be it further ordained, that all ordinances and

parts of ordinances militating against this ordinance be, and the
7 same are hereby, repealed.

"Done in council this 5th day of January, A. D. 1874.

(Signed) "CHAS. ESTES,
Mayor C. A.

[L. S.] "Attest: L. T. BLOME,
"*Clerk of Council.*"

Your orator is informed, and believes, and charges that so much of said ordinance as relates to insurance companies is unauthorized by any power possessed by said city council, and is indeed no ordinance nor of any force, avail, nor effect whatsoever, but is altogether and utterly null and void, and, saving and reserving any and all other objection which may to said ordinance or any part thereof be had or taken, your orator so charges for these reasons, to wit:

First. That said city council has no power to impose any tax on any incorporated company located, having an office, or doing business in said city of Augusta.

Second. That said city council has no power to make any by-law repugnant to the constitution and laws of the State of Georgia, and said ordinance is so repugnant.

8 Third. That if said city council ever possessed the power to make such ordinance, such power was taken away from said council by the insurance act aforesaid.

Fourth. That said ordinance is in restraint of trade.

Fifth. That said ordinance is unreasonable, unfair, partial, and oppressive, exacting large amounts without warrant, and discriminating in favor of some kinds of insurance companies and against other kinds, which discrimination is unknown to the laws of the State of Georgia, and hath not heretofore been known even in the ordinances of said city council.

Sixth. That said ordinance is in direct opposition to a general law of the State of Georgia, to wit, the insurance act aforesaid, assuming to regulate in the city of Augusta in one way that which said general law regulates in another and different way throughout the State of Georgia.

Seventh. That said ordinance varies said general act in a special and discriminating manner without the consent of those to be affected thereby, and thus violates so much of the constitution of the State of Georgia as provides that no general law affecting private rights shall be varied in any particular case by special legislation without the free con-
9 sent in writing of those to be affected thereby.

Eighth. That said ordinance impairs the obligation of that contract between your orator and the State of Georgia, whereby your orator, as aforesaid, has been and is authorized to transact the business of insurance in the State of Georgia, and thus violates so much of the Constitution of the United States as provides that no State, and a fortiori no political subdivision of a State, shall pass any laws impairing the obligation of contracts.

Ninth. That said ordinance is in contravention of common right, tending to the restriction and prohibition of a business honest in itself and highly useful to the public.

Tenth. That said ordinance is in contravention of the public policy of the State of Georgia, tending to drive away capital now present and to discourage the introduction of new capital from without the State; to lessen the public security and advantage derived from the presence of

said capital; to unhinge, confuse, and disorganize the insurance system of said State, and to injure and lessen the revenue of said State.

Eleventh. That said ordinance, while ostensibly imposing a license-tax on insurance companies, in reality levies an arbitrary and une-
10 qual tax on the property of such companies, and thus violates so much of the constitution of the State of Georgia as provides that protection to property shall be impartial and complete, and that taxation on property shall be ad valorem only, and uniform on all species of property taxed.

Twelfth. That said ordinance, so far as respects insurance companies, while ostensibly an exercise of the police power for purposes of regulation, is in reality an exercise of the taxing power for purposes of revenue, and this when said taxing power for said purposes of revenue has already been exercised for the same fiscal year as regards the property of insurance companies, as from the ordinances of said city council of the twenty-eighth day of December, eighteen hundred and seventy-two, and the thirty-first day of March, and the twenty-third day of December, eighteen hundred and seventy-three, copies whereof, as published, are hereunto annexed, will more fully appear; and

Thirteenth. That said ordinance is in contravention of the supreme law of the land, taking the private property of your orator for public use without just compensation. For such protection as your orator receives from said city council your orator fully pays, in paying unto said city council the general taxes levied by said city council on the
11 business of your orator. Authority to transact the business of insurance in the city of Augusta aforesaid your orator already hath and hath had as aforesaid by contract with and purchase from the State of Georgia. And so, whether the license *be* levied in said ordinance upon your orator be for such protection or such authority, it is equally an exaction upon your orator for that for which your orator hath already fully paid, and is entitled in equity and good conscience to have, exercise, and enjoy without further payment or condition.

And further sheweth your orator, that none of the foregoing objections, saving all other, to the validity or sufficiency of said ordinance, are in anywise obviated or avoided, as by said city council may be pretended, by or under the fourth section of an act of the general assembly of the State of Georgia entitled "An act to authorize the city council of Augusta to affix a penalty for failure to make tax returns or pay the same, and to enforce the collection of the same by execution," approved on the twenty-sixth day of February, eighteen hundred and seventy-four, and published by authority in the public gazettes of the said city of Augusta on the twenty-fourth day of March, eighteen hundred and seventy-four, and saving and reserving any and all other
12 objection which may to said section or any other part of said act or to said act be had or taken, your orator so charges, for the reasons following, to wit:

First. That said act in said section declares of full force and effect "all ordinances heretofore passed by said city council of Augusta for the levying, assessing, and collecting any taxes for the support of said municipal government for the year 1874," and in so much thereof as validates said ordinances for the levying and assessing said taxes contains matter different from what is expressed in the title thereof, and is therefore in violation of so much of the constitution of the State of Georgia as declares that no laws shall pass which contain matter different from what is expressed in the title thereof, and consequently void.

Second. That said act in said section impairs the obligation of that

contract between your orator and the State of Georgia whereby you orator hath as aforesaid authority from said State to transact the business of insurance in said State, and is in violation of so much of the Constitution of the United States as forbids any State to pass any law impairing the obligation of contracts, and by reason of such violation is under the constitution of the State of Georgia void, and hath never had any binding force.

13 Third. That said act in said section is an authorization by the general assembly of the State of Georgia with the said city council to repeal a general statute of the State, to wit, the insurance act aforesaid, and said general assembly cannot lawfully confer upon a municipal corporation the power to repeal by ordinance a statute of the State.

Fourth. That said act in said section varies a general law of the State of Georgia, to wit, the insurance act aforesaid, affecting the private rights of your orator in a special and discriminating manner without the consent of your orator, and is therefore in violation of so much of the constitution of the State of Georgia as provides that there shall be no such variance, and consequently void.

Fifth. That said act in said section validates ordinances which impose penalties, and is thus an ex-post facto act, and therefore in conflict with so much of the Constitution of the United States as provides that no State shall pass any ex-post facto act.

Sixth. That said act in said section is retrospective in its operation, and divests your orator of your orator's right to transact insurance business in the State of Georgia, which right had vested in your orator prior to the passage of said act, and is therefore unconstitutional and void.

14 Seventh. That said act in said section is partial, unequal, oppressive, and contrary to good faith, good conscience, fair dealing, and natural justice, by requiring, by authority of the State of Georgia, your orator to comply with new and further terms, and to pay new and further monies as conditions precedent to the lawful possession, exercise, and enjoyment of a right already granted your orator by said State upon full compliance by your orator with all the terms, and full payment by your orator of all the monies, originally required from your orator by said State for said right, and that said act in said section is therefore unconstitutional and void.

And now further sheweth your orator, that the nature of the business of insurance is such that it is peculiarly desirable and even necessary to the prudent and profitable management of said business that any question as to the validity or sufficiency of any law or ordinance affecting or relating to the same should be passed upon in due course of law by such process as will most surely avoid circuity of action and determine such question with the least possible delay.

And further sheweth your orator, that your orator's grievance,

15 representations, information, belief, and purpose in this bill are the grievance, representations, information, belief, and purpose of divers other incorporated companies, all whereof are authorized in like manner as your orator by the State of Georgia to transact the business of insurance in said State, and are severally as follows, to wit: The Ætna Insurance Company, the Hartford Fire-Insurance Company, the Phœnix Insurance Company, and the National Insurance Company, all incorporated under the laws of the State of Connecticut to transact the business of fire insurance; the Continental Insurance Company of the city of New York, the Germania Fire-Insurance Company,

the Hanover Fire-Insurance Company, the Howard Insurance Company of New York, the Citizens' Insurance Company, and the Phœnix Insurance Company, all incorporated under the laws of the State of New York to transact the business of fire insurance; the Franklin Fire-Insurance Company of Philadelphia and the Insurance Company of North America, both incorporated under the laws of the State of Pennsylvania, the former to transact the business of fire insurance, and the latter to transact the business of fire, inland, and marine insurance, and
the Liverpool and London and Globe Insurance Companies,
16 the London Assurance Corporation, the Imperial Fire-Insurance Company of London, the North British and Mercantile Insurance Company of London and Edinburg, the Queen's Insurance Company, and the Royal Insurance Company, all incorporated under the laws of the United Kingdom of Great Britain and Ireland to transact the business of fire insurance; and your orator sheweth that conference hath been had between all said companies and your orator touching the grievance common to all as set forth in this bill, and by and in pursuance of common understanding had your orator brings this bill.

Wherefore, and upon the premises, your orator prays this honorable court to enjoin the said city council of Augusta from levying, assessing, or collecting said license-tax assessed in the hereinbefore-recited ordinance of said city council of the fifth day of January, eighteen hundred and seventy-four, upon your orator, or from in any manner holding out or acting under said ordinance, as in so far as the same relates to fire-insurance companies, of any validity, force, or effect whatsoever.

And may it please this honorable court to grant unto your orator the State's writ of subpœna, to be unto said city council
17 directed, commanding said city council to be and appear at an early day, in the discretion of this honorable court, before this honorable court, then and there answer to make unto the foregoing allegations, and to abide by and perform the order and decree of this honorable court in the premises; and that your orator may have such other and further relief in the premises as the nature of the case may demand and as to equity shall be meet and fit; and your orator will ever pray, &c.

SALEM DUTCHER,
Complainant's Solicitor.

18 In chambers at Augusta, April 4, 1874.

Let this bill be filed and copies served on respondents, who will show cause before me on Saturday, the 18th day of the present month, why the injunction prayed should not be granted.

WM. GIBSON,
Judge Sup'r Court.

STATE OF GEORGIA,
Richmond County:

To the city council of Augusta, of said county, greeting:

For certain causes to us made known by the bill of complaint of the Home Insurance Company of New York, filed in the clerk's office of the superior court of said county, on the chancery side of said court, in which said Home Insurance Company of New York is complainant, and you, the said city council of Augusta, are defendants, we command and strictly enjoin you that, laying all business aside, and notwithstanding any excuse you may have, *that* you be and appear before us at our

superior court, to be held in and for said county on the 18th day
19 of April, instant, to answer to all such matters and things as may then and there be objected against you, and to stand to and abide the further order and decree then and there to be made in the premises.

Witness the honorable William Gibson, judge of said court, this 4th day of April, 1874.

S. H. CRUMP,
Dep'ty Clerk.

Due and legal service of the within acknowledged; further service waived.

April 4, '74.

J. C. C. BLACK,
City Atty.

20 *Defendant's answer.*

GEORGIA, *Richmond County:*

THE HOME INSURANCE COMPANY OF NEW York
vs.
THE CITY COUNCIL OF AUGUSTA.
} Bill for injunction in Richmond superior court.

The answer of the city council of Augusta.

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto, this defendant, answering, saith:

This respondent answers, that said complainant has been and is transacting the business of fire insurance in said city of Augusta, but whether said complainant has complied with said act of the general assembly of said State, approved March 19th, 1869, and known
21 as the insurance act, this respondent has no knowledge, information, or belief, except such as is set forth in said bill, and respondent prays that said complainant may be held to legal proof of said allegation.

Respondent, further answering, saith, that it is true that said city council is a municipal corporation chartered by the general assembly of said State, and has no power except such as is conferred by law, or such as is incident to the powers conferred.

Respondent, further answering, saith, that said respondent did, on the day and year set forth in said bill, enact an ordinance to amend an ordinance entitled "An ordinance to assess and levy taxes for the support of the municipal government of Augusta," etc., as set forth in said bill, which said ordinance this respondent asserts and maintains does not violate any law of said State or of the United States, or any public policy of either, but said ordinance is a valid and legal ordinance.

Respondent, further answering, saith, that the authority of said city council in the premises was not exhausted by the said ordinances of said city council of the 28th of December, 1872, and the 31st of
22 March and 23d of December, 1873, as in said bill alleged.

Respondent, further answering, saith, that while respondent denies its liability to be called on for the reasons that induced any legislation by said council, *that* the increase in the tax upon said complainant and other like companies was not without reason, but was because said companies are banded together under an organization known as the Board of Underwriters of Augusta, and arbitrarily fix the rates of insurance, and before the passage of said ordnance, by a mutual agreement among said companies, advanced the rates of insurance upon property in said city from fifty to three hundred per cent., and that, considering the immense amounts paid to said companies yearly by the property-owners of said city, is not unreasonably or unjustly high.

This respondent further respectfully submits, that within the jurisdiction of said city, and operating upon the subjects of taxation, the rate of taxation to be imposed by said city council is within their discretion, without liability to any court or other authority except their constituency.

Respondent, further answering, says, that the general assembly
23 of said State, by an act approved February 26, 1874, confirmed the said ordinance complained of, and all other ordinances passed by said city council for the purposes of raising revenue for the support of said city government for the year 1874.

This respondent, protesting that said complainant is not entitled to the relief prayed for, prays your honor to refuse the injunction asked, and to be hence dismissed with reasonable costs and charges.

JAS. C. C. BLACK,
H. CLAY FOSTER,
Attorneys for Respondents.

24 *Amendment.*

STATE OF GEORGIA,
Richmond County:

In the superior court of said county.

THE HOME INSURANCE COMPANY OF NEW YORK, complainant,
vs.
THE CITY COUNCIL OF AUGUSTA, GEORGIA, respondent.
} Bill for injunction.

And now comes complainant in above-stated case and amends complainant's bill therein as follows, to wit:

And further shews your orator, that the license-tax assessed in said ordinance of January 5, 1874, on insurance companies, is made payable by said city council unto and at the office of the collector and treasurer of the city of Augusta, an office of said city council, and divers insurance companies doing business in said city have so paid said license-tax, among others the Insurance Company of North America, and record of such payments is kept in a book in said office called the license-book for 1874, and on such payments coupons, one for each of said companies
as aforesaid paying, have been cut and delivered to each such
25 company a stub or memorandum bearing same date, number, amount, and name, and description as such coupon remaining in said book, stub, or memorandum, and coupons is now prayed; and it is further prayed that said book, stub, or memorandum, and coupons be made and considered as set forth in exact copy thereof as appended as

an exhibit unto this bill; and further sheweth your orator, that like record as in the case of insurance companies is kept in said book of license fees or charges by said city council required from peddlers, barbers, green-gro'ers, organ-grinders, and others required by said city council to purchase annually from said city council authority to transact business in the said city of Augusta; and further sheweth your orator, that like coupons are cut from like stubs in the cases of barbers, organ-grinders, and so on, as in the cases of insurance companies, and that the blank coupons in said book are all exactly alike, and the form of such blanks is as set forth in the copy thereof hereunto appended, marked "Exhibit A."

SALEM DUTCHER,
Solr. for Compl't.

EXHIBIT A.—*City business license.*

No. .] AUGUSTA, GA., , 18 .

26 Received of $\frac{1}{100}$ dollars, for license as , at No. street, which entitles to carry on said business until the thirty-first day of December next.

Collector & Treasurer, C. A.

Answer to amendment.

THE HOME INSURANCE COMPANY OF NEW YORK } Bill for injunction
vs. } in Richmond su-
THE CITY COUNCIL OF AUGUSTA. } perior court.

Answer of said defendant to the amendment to said bill.

This respondent, reserving all right of exceptions, etc., for answer to said amendment says, that said license-tax is made payable by said city council at the office of the collector and treasurer of the city of Augusta, where all taxes are paid, and that some of the insurance companies doing business in said city have paid said license-tax, among them the Insurance Company of North America.

27 Respondent further admits the allegations in said amendment as to the record of said payment and the book called the license-book, and the allegations therein contained as to the stub, memorandum, and coupons therein referred to, and the correctness of the exhibit to said amendment showing form of receipt given by said collector and treasurer. Further answering, respondent says that the said book and the record of payment of said tax and the form of said receipt are not prescribed by any ordinance or requirement of the said city council, but the same were adopted by said collector and treasurer for his own convenience, and instrument set forth in in said Exhibit A is a mere receipt for the payment of said tax, and does not and cannot change the legal character of said tax into a license.

Further answering, respondent says said collector and treasurer keeps in his office a license-book such as is described in said amendment, from which he issues to persons applying for the same licenses to carry on such business as are required by the ordinances of said city to be licensed, and that said collector and treasurer, as for his own convenience,

28 and without any requirement and without the knowledge of the

respondent, issued to said companies paying said tax a receipt in form as set forth in said Exhibit A.

Respondent, further answering, says that the companies who have paid said license-tax cannot of course be entitled to the injunction; that if said complainant objects to the form of said receipt, the said city council is willing and hereby offers to change the same and give such receipt as said companies may require.

Respondent, further answering, says that by the ordinances of said city all businesses are taxed except those especially exempt by the laws of the State, such as lawyers, physicians, dentists, and photographers, and the record of the payment of said tax is kept in said book, and like receipts are given to merchants and all others doing any other business that is taxed.

Respondent further says, that licenses proper, to do any business in said city, such as to sell liquor, peddlers, &c., are issued by the clerk of said council, who alone has the authority to issue licenses, and that the receipt issued by said collector and treasurer does not confer
29 authority to do that which was before illegal, but is only a receipt for said tax. And having fully answered, respondent prays to be herein discharged, &c.

JAS. C. C. BLACK,
Atty. for City.

AUGUSTA, *May* 9, 1874.

Since the hearing in this cause I have been too much engaged to examine fully all the questions involved; and as I see no opportunity soon of fully preparing an opinion in the same, to give the parties an early hearing in the supreme court, where I am almost absolutely certain it will be carried, as peoples seem now to think nothing is settled, the injunction prayed is refused, for the reason that all taxable property or things by the State and not exempted specially is taxable by the city.

WM. GIBSON,
Judge Sup'r Court.

30 GEORGIA, *Richmond County:*

Personally appeared Charles Estes, who, being sworn, says that he is the mayor of the city of Augusta; that he has read the answer of said city council to the amendment to the bill of the Home Insurance Company against said council, and that the facts therein stated as to the book in which is kept a record of the payment of taxes is true; that the said book, and the manner of keeping the same, and the form of receipt given for said taxes, are not required by said city council, but are adopted by said collector and treasurer for his own convenience.

Deponent further says that all the facts stated in said amendment, not conclusions of law, are true.

CHAS. ESTES,
Mayor C. A.

Subscribed, sworn to before me this 1 day of May, A. D. 1874.
L. T. BLANE,
Not. Pub. R. C.

31 An ordinance to define the subjects and regulate the mode of taxation, and the manner of returning the same, in the city of Augusta.

SECTION I. Be it ordained by the city council of Augusta, and it is

hereby ordained by the authority of the same, that on the tenth day of March, or as soon thereafter as practicable, in each and every year, the city council of Augusta shall prescribe and fix the rates of taxation upon the hereinafter-mentioned subjects for the current fiscal year; and the city assessor, in preparing his tax-lists and digests, shall conform to the said subjects, which are as follows, to wit:

1. On the assessed value of all real estate lying and being within the corporate limits of the city of Augusta, including every building or other improvement on land, under lease from the city council, bodies corporate, or individuals for any term of years.

2. On each and every Turknett spring hydrant, and for every additional family using the same.

3. On each and every Turknett spring hydrant on premises occupied as a hotel, boarding-house, or as a livery-stable.

32 On each and every improved lot lying on any street through which the main pipes of the Augusta water-works pass, which tax shall entitle the owner or occupant to the use of the water, through one opening, in front of or in any part of said lot, where the specific water-rent does not exceed this tax.

5. On the market-value of all railroad, municipal, or other bonds, (city of Augusta bonds excepted,) on all solvent notes and accounts, on all money loaned at interest or on hand, and on all other evidences of debt.

6. On the market-value of any share or shares in any national bank in this city, or in any other bank or corporation having banking privileges in this city, or in any other incorporated company, and held, owned, or represented in the city of Augusta on the first day of January in each and every year, to be returned, under oath, by the individual shareholders in said banks and other corporations, or their agents or representatives, as required by this ordinance; provided, that the bank or other corporation having banking privileges, or other incorporated company, may, through the proper officer, return all the shares belonging to its shareholders, and pay the tax thereon for them; and in
33 that event the shareholder shall not be liable to return his, her, or their shares.

7. On every one-horse pleasure carriage or buggy.

8. On every two-horse pleasure carriage or buggy.

9. On every horse or mule, except such as are kept for hire by keepers of livery stables, or are introduced and kept for sale, or are actually used in licensed vehicles.

10. On all merchandize owned or held on consignment, or stock in trade, the amount of which is to be given in at cost-price by the owner or agent, except in case of goods, &c., on consignment, which shall be given at their wholesale prices, under oath, and to be the highest amount on hand between the first day of October and the first day of January last past.

11. On the net earnings of the Augusta and Summerville Railroad Company over and above any annual or other dividends or division of profits, in excess of seven per cent. of their said net earnings, declared or paid by said company to any of its shareholders.

SECTION II. All the foregoing taxes shall be returned to the city assessor on or before the first day of March in each and every
34 year, and the returns shall include all property held, owned, or represented in the city of Augusta on the first day of January of the year in which the return is made, unless otherwise expressed or required in this ordinance; and for every day's default in making said

return, after the time herein allowed, there shall be a penalty of not exceeding ten dollars, recoverable upon conviction in the recorder's court, and the party in default shall also be subject to double taxation upon his, her, or their property, the city assessor to make the returns in such cases upon the best and most reliable information as to the defaulter's taxable property attainable.

SEC. III. It shall be the duty of the city assessor to have the two tax digests made up by the tenth day of March in each and every year, and report to a meeting of council, to be called as provided for in the first section of this ordinance, the gross amount and value of property returned and entered therein for taxation for the current year; whereupon council shall proceed to fix and declare the rates of taxation as hereinbefore provided.

SEC. IV. Taxes on the following subjects shall be levied at the same time, and shall be paid quarterly on the first days of January, April, July, and October of each year, or within ten days thereafter; and on failure to return the same, the party in default shall be reported to the recorder's court by the collector and treasurer, and on conviction be fined in a sum not exceeding ten dollars for each day's default, to wit:

1. On all sales of real estate made by real-estate brokers.

2. On all auction sales of real estate, goods, wares, merchandize, bonds, stocks, and other personal property; but no sales at auction shall be taxed when such sale is made by executors, administrators, or guardians, or by any order of court.

3. On the gross receipts of the keepers of livery-stables.

4. On the gross premiums of every insurance company not located in this city.

5. On the gross receipts of every telegraph company and express company having an office or doing business in this city.

6. On the gross receipts of every hotel in the city.

7. On the gross receipts of all transient dealers or itinerant traders—that is, persons having no lease of a store in this city for a year or longer—and of all commercial agts.

SEC. V. The finance committee shall be empowered to assess the value of any real estate which has not been assessed by the board of city assessors.

SEC. VI. Be it further ordained, that all ordinances and parts of ordinances levying any tax, or prescribing the mode of returning or paying the same, or any other regulation in relation thereto, are continued in full force and effect, except the tax on preperty contained or included in the new tax digest, until the new rates of taxation are fixed and declared by council to be of force and effect in accordance with the provisions of this ordinance, except so far as the same may be in conflict with any of its present requirements and conditions.

SEC. VII. Be it further ordained, that all city taxes on real estate and other articles charged in the city tax digest shall be payable within thirty days after such digest has been placed in the collector's hands for collection. On all taxes unpaid after the expiration of thirty days there shall be levied an additional tax of four per cent.; on all taxes unpaid after the expiration of sixty days, five per cent.; on all taxes unpaid after the expiration of ninety days, six per cent.; on all taxes unpaid on the first of September, seven per cent.; on all taxes remaining unpaid on the first of November, execution, with ten per cent. added to the amount of tax, shall be issued.

SEC. VIII. Be it further ordained, that the fiscal year shall begin on the first day of January of each and every year.

SEC. IX. And be it further ordained, that all ordinances and parts of ordinances militating against this ordinance be, and the same are hereby, repealed.

Done in council this 28th day of December, A. D. 1872.

CHAS. ESTES,
Mayor C. A.

[L. S.] L. T. BLOME,
Attest: *Clerk of Council.*

38 An ordinance to fix the annual and specific taxes of the city of Augusta for the year 1873, and to provide for the collection of the same.

SECTION I. Be it ordained by the city council of Augusta, and it is hereby ordained by the authority of the same, that the following annual and specific taxes shall be levied and collected for the year 1873, payable on the first day of January in said year, or within ten days thereafter:

1. On every merchant, contractor, factor, or any other person or firm doing any kind of business within the corporate limits of this city, except such as are specially taxed by this ordinance, the sum of ten dollars when his, her, or their gross sales or receipts do not exceed ten thousand dollars; the sum of twenty dollars when such sales or receipts are over ten and not exceeding twenty thousand dollars; thirty dollars when these exceed twenty and do not exceed thirty thousand dollars; forty dollars when they are more than thirty and do not exceed forty thousand dollars; fifty dollars when they are more than forty and do not exceed fifty thousand dollars; seventy-five dollars when they are over fifty and less than one hundred thousand; and one
39 hundred dollars when they amount to or exceed one hundred thousand dollars. On every transient or itinerant dealer, on every vendor of any specific article, and on every peddler, the sum of seventy-five dollars; on each and every commercial agency, or branch thereof, twenty-five dollars; on each bakery, the sum of twenty-five dollars; on every cotton-broker or buyer of cotton on commission, one hundred dollars; on every cotton-exchange, five hundred dollars; on every express company, one hundred dollars; on each barber-shop, ten dollars, and for every chair beyond two an additional tax of five dollars; on every vendue-master or firm of vendue-masters, one hundred dollars; on every exchange-broker or private banker, the sum of one hundred dollars; on every insurance company not located in this city, the sum of one hundred dollars; on every photograph-artist or firm, the sum of twenty-five dollars; on every practicing physician, surgeon, dentist, lawyer, or firm, the sum of ten dollars; and on each and every billiard-table kept for hire, fifty dollars; on each green-grocer, the sum of two hundred dollars; on each bill-poster, the sum of ten dollars; on each pawnbroker, the sum of two hundred dollars; on every organ-grinder or street musician, five dollars per month; on the owner
40 or owners of every job-printing office, twenty-five dollars; on every coal-yard, twenty-five dollars; on every manufacturer of confectionaries, fifty dollars; on every real-estate agent and broker, twenty-five dollars; on furniture manufacturers, fifty dollars; on every cotton-pickery or hand cotton-press, one hundred dollars; on every owner or owners of lumber-yard, or dealers in lumber, fifty dollars; on

every steam-engine, except such as are used in business which is taxed, fifty dollars; on the owner or owners of each merchant or grist mill, twenty-five dollars for each and every run of stones; on the owner or owners of each planing-mill, fifty dollars; on the owner or owners of every livery or sale stable, or either, one hundred dollars; on every wholesale ice-dealer, fifty dollars; on the owner or owners of every foundry or machine-shop, fifty dollars; on every tobacco or cigar manufactory, fifty dollars; on every huckster, ten dollars; on every manufacturer of soda-water to be sold in bottles, twenty-five dollars; on every manufacturer of soda-water selling from a fount, ten dollars; on founts when not sold by manufacturer, ten dollars; on every marble or stone yard, twenty-five dollars; on every wagon-yard, twenty-five dollars, except those where horses and mules are kept for sale, which shall be one hundred dollars.

41 2. It shall not be lawful for any dealer in horses or mules to offer his stock for sale until he shall have taken out a license, to expire at the end of one month, for which he shall pay the sum of ten dollars; but such license may be renewed at the same rate. For each and every violation of this article the party offending shall be fined in a sum of twenty-five dollars for each and every offense.

3. On each and every junk-shop there shall be levied a tax of two hundred dollars, and no such shop shall be opened in the city unless the owner or owners of such junk-shops shall have previously paid into the city treasury the said tax thereon for the year, and shall have taken out a license from the office of the clerk of council, in which license it shall be distinctly expressed that such junk-shop shall always be subject to the visitation of the police of the city, a duplicate of which license, signed by such owner or owners, and expressive of his, her, or their consent to such condition, shall be retained by the clerk of council. On refusal of such owners, at any time, to submit to such visitation, such junk-shops shall immediately be closed by the mayor. And it is hereby declared and ordained that every such junk-shop license shall be subject to the farther condition that the same shall

42 be subject to revocation by the recorder if, on examination before him in the police court, he shall be satisfied, and shall so pronounce, that any city property, or any part of any machinery or any appliance of any railroad company or gas-light company, or of the water-works of Augusta, is found in any such junk-shop; and such condition shall be expressed in the license of every junk-shop dealer.

4. For each and every dog-collar or tag furnished to owners of dogs there shall be paid by said owners the sum of two dollars.

SEC. II. Be it further ordained, that hucksters' licenses shall not be entitled to any deduction on account of the time at which said license shall be issued.

SEC. III. Be it further ordained, that all ordinances and parts of ordinances fixing the rates of license and providing for the collection of the same, or otherwise regulating said licenses, not in conflict with this ordinance, shall remain in full force and effect.

SEC. IV. Be it further ordained, that all ordinances and parts

43 of ordinances militating against this ordinance be, and the same are hereby, repealed.

Done in council this 28th day of December, A. D. 1872.

(Signed) CHAS. ESTES,
Mayor C. A.

[L. S.] Attest: L. T. BLOME,
Clerk of Council.

An ordinance to fix the rate of taxation for the year 1873.

SECTION I. Be it ordained by the city council of Augusta, and it is hereby ordained by the authority of the same, that the rate of taxation for the year 1873, on all property, both real and personal, included in the list of taxable property and intended to taxed by the city council of Augusta, be, and it is hereby declared to be, at the rate of one and one-third per centum on the assessed value thereof.

SEC. II. And be it further ordained, that on all sales at auction (except sales made by and for executors or administrators) be taxed one and one-third per centum.

44 SEC. III. And be it further ordained, that the specific tax on Turknett springs hydrants, and on improved lots lying on any street through which the main pipes of the Augusta River Water-Works pass, shall remain at the same rates as for the year 1872.

SEC. IV. And be it further ordained, that all ordinances levying any tax on gross sales other than auction sales, made on and after 1st day of January last, be, and the same are hereby, repealed.

SEC. V. And be it further ordained, that all ordinances and parts of ordinances militating against this ordinance be, and the same are hereby, repealed.

Done in council this 31st day of March, A. D. 1873.

CHAS. ESTES,
Mayor C. A.

[L. S.] Attest: J. L. PATTERSON,
Deputy Clerk of Council.

45 An ordinance to assess and levy taxes for the support of the municipal government of the city of Augusta, and for the payment of the interest on the funded debt of said city.

SECTION I. Be it ordained by the city council of Augusta, and it is hereby ordained by the authority of the same, that all laws and ordinances of the city council of Augusta fixing and prescribing the subject and rates of taxation and of license, and the mode and manner of making returns of taxable property to the city of Augusta, and collecting the taxes and licenses thereof, now of force in said city, be, and the same are hereby, continued of full force and effect for the year 1874, except as to the time by which returns are to be made, until council shall otherwise order and direct.

SEC. II. Be it further ordained that all returns of taxable property in the city of Augusta shall be made to the city assessor by the first day of February in each and every year, and that the word "March," in the third line of section 2 of the ordinance of December 28, de-

46 fining the subjects and regulating the mode of taxation, etc., be, and the same is hereby, stricken out, and the word "February" inserted in lieu thereof.

SEC. III. And be it further ordained, that all ordinances and parts of ordinances militating against this ordinance be, and the same are hereby, repealed.

Done in council this 23d day of December, A. D. 1873.

[L. S.] Attest: L. T. BLOME,
Clerk of Council.

Bill of exceptions.

In Richmond superior court. In equity.

STATE OF GEORGIA,
Richmond County:

THE HOME INSURANCE COMPANY OF NEW YORK } Bill for injunction
vs. } and relief.
THE CITY COUNCIL OF AUGUSTA, GEORGIA. }

Upon hearing had in above-stated case on the bill and answer therein and amendments thereto, before his honor Judge Wm. Gibson, judge of said court, on the eighteenth of April, 1874, the following
47 decision was rendered by his honor on the ninth of May, 1874, to wit:

AUGUSTA, *May 9th*, 1874.

Since the hearing in this cause I have been too much engaged to examine fully all the questions involved; and as I see no opportunity soon of fully preparing an opinion in the same, to give the parties an early hearing in the supreme court, where I am almost absolutely certain it will be carried, as people seem now to think nothing is settled, the injunction prayed is refused for the reason that all taxable property or things taxed by the State and not exempted specially are taxable by the city.

WM. GIBSON,
Judge Sup'r Court.

And now, upon the twelfth day of May, 1874, comes the Home Insurance Company of New York, by its solicitor, Salem Dutcher, and excepts to said decision as error, and for cause of exception says:

First. That the court erred in deciding that an incorporated company is taxable property under the laws of the State of Georgia.
48 Second. That said decision, as stated therein, is not made on a full examination of all the questions involved; and

Third. That *third* decision is contrary to law.

And so the Home Insurance Company of New York, by its solicitor, Salem Ducher, prays the court to certify this its bill of exceptions.

SALEM DUTCHER,
Complt.'s Solr.

I do hereby certify that the foregoing contains a correct and full statement of the case as heard before me, and also a correct statement of the errors complained of.

The clerk of the superior court is hereby ordered to make a full transcript of all the proceedings in said cause, and forward the same to the present supreme court, that the errors complained of may be examined and heard in said court.

May 14, 1874.

WM. GIBSON,
Judge Sup'r Court.

49 GEORGIA, *Richmond County:*

CLERK'S OFFICE, SUPERIOR COURT.

I, Samuel H. Crump, deputy clerk of said county, do hereby certify that this is a full and true copy of the original bill of exceptions and

the papers in the case and the order of the court as recorded on the minutes and of file April 4, 1874, in cause wherein the Home Insurance Company of New York is plaintiff, and the city council of Augusta is defendant, held in chambers, April 4th, 1874, etc.

Witness my hand and the seal of the court, this 15th day of May, 1874.

S. H. CRUMP, *Dpty. Clk.*

50 Supreme court of the State of Georgia.

ATLANTA, *June 2d*, 1874.

The honorable the supreme court met pursuant to adjournment.

Present, their honors Hiram Warner, chief-justice, and H. K. McCay & R. P. Trippe, judges.

THE HOME INSURANCE COMPANY OF NEW York, plff. in error,
vs.
THE CITY COUNCIL OF AUGUSTA, DEFT. IN error.

This case came before the court upon a transcript of the record from the superior court of Richmond County, and after argument had, it is considered, ordered, and adjudged by the court that the judgment of the court below be affirmed.

51 Supreme court of the State of Georgia. January term, 1874.

THE HOME INSURANCE COMPANY, PLFF. IN error,
vs.
THE CITY COUNCIL OF AUGUSTA, DEFT. IN error.

TRIPPE, J.:

1. A license is a right granted by some competent authority to do an act which, without such authority, would be illegal.

2. The tax called a "license-tax," imposed by the city council of Augusta, by the ordinance of January 5th, 1874, upon foreign insurance companies doing business within the city, is a tax and not a license.

3. The city council of Augusta has power under the charter of the city to tax occupations, businesses, etc., and a foreign corporation which has an agency and a regular agent for the purpose of transacting its usual business within the city is liable to be taxed.

52 4. A tax on occupations, businesses, etc., is not, in legal contemplation, a tax on property, so as to be subject to the ad valorem and uniformity rules of taxation prescribed by the constitution, and therefore a tax on fire-insurance companies different from what is imposed on life-insurance companies does not make the tax obnoxious to any constitutional requirement.

Judgment affirmed.

53 Clerk's office supreme court of the State of Georgia.

ATLANTA, *July* 15, 1874.

I hereby certify that the foregoing pages hereto attached contain true copies of the original bill of exceptions and transcript of the record

of file in this office in the case of The Home Insurance Company of New York, plff. in error, vs. The City Council of Augusta, deft. in error, together with the judgment of the supreme court of the State of Georgia, and the decision of said court, as announced from the bench by his honor R. P. Trippe in said case, as appears from the records of this office; the same being "a true copy of the record, and of all the proceedings" in said cause, as shown by the records of this office; the opinion in said cause not having yet been filed in this office.

Witness my signature & the seal of said court affixed the day & year above written.

[SEAL.] Z. D. HARRISON,
Clk. S. C. Ga.

54 I hereby certify that the foregoing attestation, made by Z. D. Harrison, clerk of the supreme court of the State of Georgia, is in due form.

HIRAM WARNER,
Chief-Justice Supreme Court of Georgia.

55 ATLANTA, GA., *July* 16, 1874.

I hereby acknowledge to have received of the Home Insurance Compa'y of New York fourteen dollars, in full of my fees for making the foregoing copies.

Z. D. HARRISON,
Clk. S. C. Ga.

56 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the supreme court of the State of Georgia, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said the supreme court of the State of Georgia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Home Insurance Company of New York, plaintiff in error, and the City Council of Augusta, Georgia, defendant in error, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was
57 in favor of such their validity, a manifest error hath happened, to the great damage of the said The Home Insurance Company of New York, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said

Supreme Court, the twenty-seventh day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Issued 27th June, 1874.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

SAM. F. MILLER.
Associate Justice Sup. Court U. S.

(Indorsed:) Filed in office July 8, 1874. Z. D. Harrison, clk. S. C. Ga.

58 The United States of America to the city council of Augusta, Georgia, greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Georgia, wherein the Home Insurance Company of New York is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Sam. F. Miller, one of the associate justices of the Supreme Court, this 27 day of June, in the year of our Lord one thousand eight hundred and seventy-four.

SAM. F. MILLER.
Asso. Jus. Sup. Court.

59 On this ninth day of July, in the year of our Lord one thousand eight hundred and seventy-four, personally appeared before me, the subscriber, Charles H. Sibley, the duly-qualified sheriff of Richmond County, State of Georgia, and makes oath that he delivered a true copy of the within citation to James C. C. Black, esquire, the city attorney of the within-named city council of the city of Augusta, Georgia, on above date.

CHARLES H. SIBLEY,
Sheriff R. Co. Ga.

Sworn to and subscribed the ninth day of July, A. D. 1874.

[SEAL.] SAML. LEVY,
Commissioner for District of Columbia in Georgia.

Received, Augusta, Geo., July 9th, 1874, from the within-named Home Insurance Company of New York, the sum of two dollars, my fee for serving a true copy of the within on the above-named James C. C. Black, esq.

CHARLES H. SIBLEY,
Sheriff R. Co.

Received, Augusta, Ga., July 9th, 1874, from the within-named Home Insurance Company of New York, two dollars, in full of fee for above certification.

SAML. LEVY.

Filed in the clerk's office of the Supreme Court of Ga. July 10, 1874.
Z. D. HARRISON, *Clk.*

60 Know all men by these presents, that we, the Home Insurance Company of New York, and Frederick Pratt, of the city of Washington, in the District of Columbia, are held and firmly bound unto the City Council of Augusta, Georgia, in the full and just sum of five hundred dollars, to be paid to the said The City Council of Augusta, Georgia, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these present', sealed with our seals, and dated this twenty-seventh day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at a supreme court of the State of Georgia, in a suit depending in said court between the Home Insurance Company of New York and the City Council of Augusta, Georgia, judgment was rendered against the said The Home Insurance Company of New York, and the said The Home Insurance Company of New York having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said The City Council of Augusta, Georgia, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said The Home Insurance Company of New York shall prosecute its said writ of error to effect, and answer the judgment aforesaid and all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force & virtue.

(Sgd.) THE HOME INSURANCE COMPANY OF NEW YORK. [L. S.]
(Sgd.) FREDERICK W. PRATT. [L. S.]

Sealed and delivered in presence of—
[NOTARIAL SEAL.] (Sgd.) J. McKENNEY,
Notary Public, Washington, D. C.

I approve this bond.
June 27, 1874.
(Sgd.) SAM. F. MILLER.

(Indorsed:) The Home Ins. Co. of New York vs. The City Council of Augusta, Ga. Filed in office July 8, 1874. Z. D. Harrison, clk. S. C. Ga.

61 THE HOME INSURANCE COMPANY OF New York, plaintiff in error, *v.* THE CITY COUNCIL OF AUGUSTA, Georgia, defendant in error. } Application for a writ of error to the supreme court of the State of Georgia.

To the honorable Mr. Justice Miller, one of the associate justices of the Supreme Court of the United States:

Your petitioner, the Home Insurance Company of New York, a fire-insurance company, incorporated under the laws of the State of New York, respectfully sheweth unto your honor the following abstract of the record hereunto appended, to wit:

An act of the general assembly of the State of Georgia entitled "An act to regulate insurance business and insurance agencies in the State of Georgia," approved March 19, 1869, prescribes the terms upon compli-

ance with which any insurance company so desiring may obtain authority to transact the business of insurance in said State from year to year. Having complied with these conditions, your petitioner was, upon the 1st of January, 1874, and thence continued to be, and now for the year 1874 is, authorized under said act to transact said business
62 in the State of Georgia; and by virtue of such authorization your petitioner was, on the 1st of January, 1874, and thence has continued to be, transacting said business in the city of Augusta, in the county of Richmond, in the State of Georgia. On the 5th of January, 1874, the city council of said city passed an ordinance imposing an "annual license tax" of $250 on each fire-insurance company doing business in said city. On the 26th of February, 1874, the general assembly of the State of Georgia passed an act validating all ordinances theretofore passed by said city council imposing taxes for the support of the municipal government of said city for the year 1874. On the 4th of April, 1874, your petitioner filed its bill in the superior court of Richmond County aforesaid, against the said city council, to enjoin said council from collecting the $250 imposed upon your petitioner by the ordinance and statute aforesaid. Among other things, this bill charges, in the words thereof, as follows: "That said ordinance impairs the obligation of that contract between your orator and the State of Georgia, whereby your orator as aforesaid has been and is authorized to transact the business of insurance in the State of Georgia, and thus violates so much of the Constitution of the United States as provides that no State and, a fortiori, no political subdivision of a State, shall pass any law im-
63 pairing the obligation of contracts;" and also "that said act, in said section, [IV,] impairs the obligation of that contract between your orator and the State of Georgia, whereby your orator hath, as aforesaid, authority from said State to transact the business of insurance in said State, and is in violation of so much of the Constitution of the United States as forbids any State to pass any law impairing the obligation of contracts." The bill further charges that your petitioner pays a tax on its business to said city council in the shape of an annual tax of 1½ per cent. upon its gross premiums, as required by sundry ordinances set forth as exhibits to the bill. An amendment to the bill charges that certain fire-insurance companies doing business in said city have paid the "license-tax" of $250 imposed upon them by the said ordinance to the proper officer of said city, and that said officer made record of such payment in a book in his office, marked "License-Book for 1874," and handed to each company paying a coupon cut from said book, which coupon is headed "City Business-License," and recites that $250 have been received from the company "for license as fire-insurers," "which entitles it to carry on said business until the thirty-first of December next."

64 The city council of Augusta answers that the ordinance in question does not violate any law of the United States, and that it was confirmed by the said act of February 26, 1874; further answering, said council admits that your petitioner pays a tax upon its gross premiums of 1½ per cent. per annum to said council, and that your petitioner is correct in the statements of its bill relative to the "license-book for 1874," and the coupons cut therefrom, but said council says it did not direct its officer to keep such a book.

Upon the hearing of the case thus briefly stated, your honor being respectfully referred to the annexed certified copy of the record for a full history of the suit, the superior court aforesaid refused the injunction prayed by your petitioner, and, upon writ of error, that judg

ment was affirmed by the supreme court of the State of Georgia. Your petitioner respectfully sheweth that this latter judgment is final, and that said supreme court is the highest court of law and equity in the State of Georgia, and that in the suit wherein said final judgment was by said court of last resort in said State rendered there were brought in question a statute of and an authority under the State of Georgia as being repugnant to so much of the Constitution of the United
65 States as forbids any State to pass any law impairing the obligation of contracts, and that the final judgment aforesaid was and is in favor of the validity of said statute and said authority.

Wherefore your petitioner prays your honor to allow and direct the writ of error of the Supreme Court of the United States to issue unto the supreme court of the State of Georgia, in the matter of that suit adjudged in that court on the 2d of June, 1874, wherein the Home Insurance Company of New York is plaintiff in errror, and the City Council of Augusta, Georgia, is defendant in error.

And your petitioner will ever pray.

SALEM DUTCHER,
Attorney for the Home Insurance Company of New York.

(Indorsed:) Sup. Court U. S., 1874, Octo term. No. 478. The Home Insurance Company of New York, plff. in error, vs. The City Council of Augusta, Georgia. Petition for writ of error. Filed 3 October, 1874.

66 *Opinion.*

Supreme court of Georgia. January term, 1874.

THE HOME INSURANCE CO. OF NEW YORK
vs.
THE CITY COUNCIL OF AUGUSTA.

By the court:

1. A license is a right granted by some competent authority to do an act which, without such authority, would be illegal.

2. The tax called a "license-tax," imposed by the city council of Augusta by the ordinance of January 5th, 1874, upon foreign insurance companies doing business within the city, is a tax and not a license.

3. The city council of Augusta has power, under the charter of the city, to tax occupations, businesses, etc., and a foreign corporation which has an agency and a regular agent for the purpose of transacting business within the city is liable to be taxed.

4. A tax on occupations, business, etc., is not, in legal contem-
67 plation, a tax on property, so as to be subject to the ad valorem and uniformity rules of taxation prescribed by the constitution, and therefore a tax on fire-insurance companies, different from what is imposed on life-insurance companies, does not make the tax obnoxious to any constitutional requirement.

TRIPPE, J., delivering the opinion:

There is a clear distinction recognized between a license granted or required as a condition precedent before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in. 42 Ga., 596.

A license is a right granted by some competent authority to do an act which, without such license, would be illegal. A tax is a rate, or sum of money assessed on the person, property, etc., of the citizen. Bouv. L. D.; 36 Ga., 460.

A license is issued under the police power of the authority which grants it. If the fee required for the license is intended for revenue, its exaction is an exercise of the power of taxation. Cooley's Const. Lim., 201.

68 The tax assessed upon complainant by the city council of Augusta, by the ordinance of January 5th, 1874, although called a "license-tax," is more properly a tax than a license-fee, or a fee exacted in order to secure the right to engage in a business which, without paying for and obtaining such authority, would be illegal.

The title of the ordinance is, "An ordinance to amend an ordinance to assess and levy taxes for the support of the municipal government of Augusta," etc. The amended ordinance has these further words in the title: "and for the payment of the interest on the funded debt of said city." It is true this last-mentioned ordinance, which is so amended, refers to the "subjects and rates of taxation and license." But by referring to the ordinance of December 28th, 1872, entitled "An ordinance to fix the annual and specific taxes of the city of Augusta," &c., and which was continued in force by said ordinance, it will be seen that there was a special tax of one hundred dollars assessed upon such companies as that of complainant's. This is the first ordinance,

69 so far as the record shows, assessing such a tax. In that ordinance, both in the title and the enacting clause, it is called a tax. In the second and third sections it may be that a license is provided for in the cases of two classes of business, and in those sections they are denominated licenses. But the assessment made by it on insurance companies is clearly a tax. If not, the whole ordinance is not what its title and body purport it to be, and is only a series of provisions for licenses.

This ordinance, as before stated, was continued in force by the one of December 23rd, 1873, and that last is the one which was amended by the ordinance of January, 1874, against which complaint is made.

No penalty has been imposed on complainant for non-payment of the "license-tax," or for engaging in business before it was paid, or without a license. No complaint is made for the purpose of arresting proceedings of that character, but the objection is that the city council cannot require complainant either to take out a license or to pay any tax to the city; that, having obtained the right to transact its business

70 by the authority of the State, it is subject to no further liability, either as a condition precedent to the exercise of such right or as a tax upon it after it has engaged in such business.

Had it been required by this ordinance that complainant should procure a license before it could transact its business, and a penalty had been imposed for failing so to do, and the complaint was against the enforcement of the penalty, a different question, under the decisions of this court, would have been presented. But there is a plain distinction between this case and that of the Mayor, &c., of Savannah vs. Charlton, 36 Ga., 460. There the contest was as to the right of the city to impose upon Dr. Charlton the penalty prescribed by the ordinance for practicing as a physician without taking out a license from the city. It is stated in the decision that the physician was "not contesting the authority of the city to tax him for practicing his profession; what he contends for is that the city shall not make that illegal which by the law of the State is legal." And it is immediately added, "We see no good reason why the city may not tax the practice of any profession

71 within the corporate limits of the city.

This much with reference to the position assumed for plaintiff

in error, that, under the act of March 19th, 1869, it having obtained from the comptroller-general the "certificate of authority to transact business of insurance in the State," no other liability or tax could be imposed.

It may further be said that if this be so, then the State would be equally bound by its own contract, and would no more than a municipal corporation have power to assess any further tax upon such companies, or upon any person to whom a license has been granted by its authority, to practice a profession or engage in any business. And yet the lawyer, the physician, and many others have licenses granted by the State, or directly by its authority, have paid the fee for the same, and have ever been held subject to be taxed on the very business or profession covered by that license. Probably not a general-tax act has been passed for half a century or longer which has not done this very thing.

And it may be added that the legislature never thought that the
72 regulation for insurance business and insurance companies, prescribed by the act of 1869, deprived it of the power of taxing such business or companies, for it has uniformly since that time, as well as before, assessed a tax on both. And, indeed, on the 18th of March, 1869, an act was approved levying a specific tax on all premiums received by all insurance companies doing business in this State, both home and foreign. See Burch et al. vs. The Mayor, &c., of Savannah, 42 Ga., 596.

Complainant, admitting the power in the State to tax business, callings, &c., and also in certain municipal corporations to levy the same under the special terms of their charters, yet denies that the charter of the city of Augusta conferred this power on the mayor and city council. The words of the charter are, "to make such assessments on the inhabitants of Augusta, or those who hold taxable property within the same, as may seem expedient," &c. What is the meaning of the words "assessments on the inhabitants?" It certainly authorizes a tax on property.

Is it limited to that? If so, why? Business occupations and pro-
73 fessions are as equally the subject of taxation as property, and have been as regularly taxed as any real or personal property. Cooley's Cont. Lim., 479. If the assessment is not limited to the person, such as a capitation or poll tax, what is there to confine it to any one subject-matter of taxation. It has always been the rule, in the legislation of this State, to assess a tax on property, on business, and also a capitation-tax; and when taxation is referred to, the power to make assessments includes the power to assess all three, unless there be some other provision to limit it. If it does not extend to the power to levy a tax on business, &c., then it would, in this case, be restricted altogether to property; for, by the constitution of 1868, there can be but one poll-tax, and that to the amount of one dollar, and only for educational purposes. This is levied by the State. The State does not tax income, and it has been held that therefore a municipal corporation cannot. 8th Ga., 23.

In the case just referred to, The Mayor, &c., of Savannah vs. Hartridge, 8th Ga., 23, it was ruled that "the history of the legislation of the State, in reference to a particular subject-matter of taxation,
74 may be referred to as tending to aid in the construction to be given to the statute; and when the State has never taxed income, the power to do so in a corporation must appear by express words or unavoidable implication." Hence, though the statute in that case gave the city of Savannah authority to tax "real and personal estate," yet, in getting at the meaning of the act, it was held that as the State had

never made income a source of revenue, or taxable, it was not the intention of the legislature to give the power to a subordinate authority.

If the absence of such a custom or practice on the part of the legislature was a criterion in construing that statute, would not the fact that the legislation of the State had fixed a contrary policy in the matter of taxing occupations tend equally to aid in reaching the meaning of the general words, "power to make assessments on the inhabitants," &c., when used in a city charter?

But it is further objected by plaintiff in error that a foreign corporation, although it has officers and an office, and is doing business in the city of Savannah, is not an "inhabitant" in the true intent and
75 meaning of that word, as used in the charter, and therefore not liable to be taxed.

We are aware of the thorough discussion, before many courts, the question whether a corporation is an "inhabitant." Lord Coke, 2 Ins., 703, says: "Every corporation and body politic residing in any county, riding, city or town corporate, or having lands or tenements in any shire, &c., quae propriis manibus et sumptibus possident et habent, are said to be inhabitants there, within purview of this statute." He referred to the statute of Henry VIII, concerning bridges and highways, which enacted that bridges and highways shall be made and repaired by "the inhabitants of the city, shire, or riding," and that the justices shall have power to tax every "inhabitant of such city," and the collectors may "distrain every such inhabitant as shall be taxedand refuse payment thereof, in his lands, goods, and chattels."

In the case of the King vs. Gardner, Cowper, 79, a corporation was decided to come within the description of "occupiers or inhabitants."

76 In Beaston vs. The Farmers' Bank of Delaware, 2 Peters, 102, the Supreme Court of the United States say: "That corporations are to be deemed and considered as persons, where the circumstances in which they are placed are identical with those of natural persons expressly included in a statute." And this rule was recognized in South Carolina Railroad Co. vs. McDonald, 5 Ga., 531. See Louisville Railroad Co. vs. Letson, 2 How., 497, modifying the decisions in Bank of the U. S. vs. Deveaux, 5 Cranch, 84, and Strawbridge vs. Curtis, 3 Cranch, 267. See also The People vs. The Utica Insurance Co., 15 Johns., 358.

In Davis and Redding vs. The Central R. R. & B. K. G. Co., the judgment of the court was, not that a corporation was not an inhabitant, but that where a charter of a railroad provided that "the principal office of the company shall be located at Savannah, with subordinate offices or agencies at Macon, and such other places as the board of directors shall determine, and all elections and meetings of stock-
77 holders shall be held at such principal office only," it was said that "this is not the same as would have been a provision that the corporation shall be established at Savannah." The case arose upon the question of the unconstitutionality of an act of the legislature making the road liable to be sued for killing live stock in the county where the damage was done. It was held that the act was constitutional, and that the legislature had power over the question of what shall be the place of residence of a corporation. Judge Benning, in his opinion in that case, seems to object pretty strongly to the English rule, as given by Coke, but stated that it was not necessary to hold that it was not the law in this State, in order to reach the conclusion to which the court came. Indeed, all the cases either directly or indirectly admit that a corporation is an inhabitant for the purposes of taxation. Nor

is the case in 5th Cranch, supra, in conflict with this, for in that it is said of a corporation, "This ideal existence is considered as an inhabitant where the general spirit and purposes of the law require it." This is substantially what was said in 2 Peters, supra; and to show
78 the force that was given to it, it is quoted in the opinion in Louisville R. R. Co. vs. Letson, supra; and the question immediately put, "If it be so for the purposes of taxation, why is it not for the purposes of a suit," &c; and then it is added, "Certainly the spirit and purposes of the law require it."

The fact that complainant is a foreign corporation does not affect the question as to its liability to taxation. It may contract in this State, sue here, and the State could authorize it to hold real estate. The Union Br. P. R. Co. vs. The E. T. & Ga. R. R. Co., 14 Ga., 327. In the Bank of Augusta vs. Earle, 13 Pet., 588, Taney, Ch. J., says: "It is sufficient that its existence as an artificial person in the State of its creation is acknowledged and recognized by the law of the nation where the dealing takes place, and that it is permitted by the law of that place to exercise there the powers with which it is endowed."

This was said with reference to the rights which a corporation may enjoy outside of the State of its creation. If it held property in another State, would not that property be subject to be taxed by that
79 State, and equally with other similar property by the municipal corporation within whose limits the property was? If it enjoy other privileges or rights within that same municipal corporation, is it not liable to the same taxes as other inhabitants? We think that upon principle and authority it is.

It was further objected by complainant that the tax upon fire-insurance companies, being different from that on life-insurance companies, made it obnoxious to that provision of the constitution which requires that "taxation on property shall be ad valorem only, and uniform on all species of property taxed." In the cases of Burt vs. The Mayor, &c., of Savannah, supra, and Bohler vs. Schneider, 49 Ga., 195, it was held that tax on professions, business, &c., was not a tax on property, so as to be subject to the constitutional requirement of uniformity, and that it must be ad valorem. In the case of the Bank of the State of Georgia vs. The Mayor, &c., of Savannah, Dud. Rep., 130, it is said: "Every man's private business, pursuit, or calling are things in which he has an interest, and many species of employment are legitimate sub-
80 jects of taxation, and are taxed. Still, they are not, strictly speaking, property. They are the means from which income is derived, property made; but there is a clear distinction between the employment and income or profits." The tax-acts of the State assessing taxes on professions, &c., vary the tax from ten dollars to ten or twenty times that sum. And this has been so in every tax-act which has been passed since the uniformity and ad valorem rule has been in the constitution. This contemporaneous, unbroken, practical exposition of the meaning of the constitution by all departments of the State government should not be disregarded in the search for the true interpretation of the provision we are considering. By the light of this, and the principles and authorities cited, we conclude that the court below did not err in refusing the injunction prayed for.

Judgment affirmed.

81 Clerk's office supreme court of Ga.

ATLANTA, GA., *Aug.* 29, 1874.

I hereby certify that the foregoing pages hereto attached contain a true copy of the opinion of the supreme court of the State of Georgia

in the case of The Home Insurance Company of New York, plff. in error, vs. The City Council of Augusta, deft. in error, as appears from records of file in this office.

Witness my signature and the seal of said supreme court affixed the day & year above written.

Z. D. HARRISON,
Clk. S. C. Ga.

(Indorsed:) Sup. Court U. S., 1874, Octo. term. No. 232. The Home Insurance Company, plff. in error, vs. The City Council of Augusta. Certified copy of opinion. Filed 3rd October, 1874.

(Indorsement on cover:) No. 232. The Home Insurance Company of Gew York, plaintiff in error, vs. The City Council of Augusta, Georgia. Neorgia sup. court. Filed 28th August, 1874.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

No. 232.

The Home Insurance Company of New York,

PLAINTIFF IN ERROR,

vs.

The City Council of Augusta, Georgia,

DEFENDANT IN ERROR.

BRIEF OF

SALEM DUTCHER,
Attorney for Plaintiff in Error.

WASHINGTON:
PRINTED BY JOHN L. GINCK,
1876.

UNITED STATES OF AMERICA.

IN THE

Supreme Court of the United States.

TO THE OCTOBER TERM, 1874.

THE HOME INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF AUGUSTA, GA., DEFENDANT IN ERROR.

No. 232.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT OF THE CASE.

This is a proceeding in which plaintiff in error, claiming to have been duly authorized under "An Act to regulate insurance business and insurance agencies in the State of Georgia," (*Ga. Laws*, 1869, p. 127) to transact business in that State for and during the year 1874, seeks to enjoin the collection of the sum of $250 required from it under an ordinance of the City Council of Augusta, Georgia, of January 5, 1874, (*Record*, p. 2, § 6) as a "license tax" for that year. The ground on which the injunction is asked is that plaintiff in error had, by contract with the

State under the above act, authority to do business therein for and during the year 1874, and that the ordinance of the City Council impairs the obligation of that contract by requiring plaintiff in error to comply with other and further terms than those stipulated in the original agreement, as condition precedent to the lawful exercise and enjoyment in the city of the right conferred upon it by its contract with the State.

The Court below, while admitting that plaintiff in error has the authority claimed and that such authority is by contract as alleged, sustains the validity of the ordinance on the ground that it does not prescribe new conditions precedent, but assesses a tax upon the business of plaintiff in error and that, under its charter, as passed in 1798, the City Council of Augusta has power to tax occupations.

There are some lesser points in the case, but none not resolvable, more or less directly, into the above.

The bill alleges in terms, (*Record*, p. 3, § 9):

"That said ordinance impairs the obligation of that contract between your orator and the State of Georgia, whereby your orator, as aforesaid, has been and is authorized to transact the business of insurance in the State of Georgia, and thus violates so much of the Constitution of the United States as provides that no State, and, *a fortiori*, no political sub-division of a State, shall pass any laws impairing the obligation of contracts."

—And alleges the same objection against the IV section of an act of the General Assembly of the State of Georgia which defendant in error claims validates the ordinance. (*Record*, p. 4, § 12.)

"That said Act in said section impairs the obligation of that contract between your orator and the State of Georgia whereby your orator hath as aforesaid authority from said State to transact the business of insurance in said State, and is in violation of so much of the Constitution of the United States as forbids any State to pass any law impairing the obligation of contracts."

Plaintiff in error alleges the same objection against the ordinance in other ways less express, charging that it is in contravention of various provisions of the Constitution and laws of the State of Georgia in force at the time the contract was made and, therefore, on the well-known rule, entering in and forming part of the same (*Record*, pp. 3, 5) and, particularly, that it assumes to regulate the business of insurance in Augusta in another and different way from that directed in the "Act to regulate insurance business and insurance agencies in the State of Georgia" (*Record*, p. 3, § sixth; and p. 5, § third), and that the "license tax" prescribed by the ordinance has been in sundry cases received and receipted for by defendant in error, per its Collector and Treasurer, as a license fee, which was recorded in a City office book marked "License Book for 1874" and coupons cut therefrom given to the insurance companies which complied with the exaction in this form. (*Record*, p. 9, § 26.)

CITY BUSINESS LICENSE.

No. . AUGUSTA, *Ga.*, 18 .

RECEIVED of $\overline{100}$ dollars
FOR LICENSE as
at No. street, which entitles to carry on said business until the thirty-first day of December next.

$.

Collector and Treasurer C. A.

Defendant in error asserts that the ordinance does not violate any law of the State or the United States; justifies it as an exercise of the taxing power conferred upon the City by its charter; declares it was adopted because plaintiff in error has entered into a Board of Underwriters with other-like companies and with those companies "arbitrarily fixes the rates of insurance" in the City, and

before the passage of the ordinance heavily advanced those rates; says the "license tax" the ordinance prescribes is a tax, and not a license fee; and admits that plaintiff in error is correct as to the "license book for 1874;" the form of coupon cut therefrom, &c.; but says the City Collector and Treasurer did all this simply for his own convenience. (*Record*, pp. 7, 8, 9, 10.) On these latter points, however, defendant in error is so contradictory it is difficult to synopsize its statements. In one place the answer reads: (*Record*, p. 9, § 28.)

"Further answering, respondent says said collector and treasurer keeps in his office a license book such as described in said amendment [to the bill,] from which he issues to persons applying for the same licenses to carry on such businesses as are required by the ordinances of said city to be licensed;"

And in another place: (*Record*, p. 10, § 29).

"Respondent further says, that licenses proper, to do any business in said City, such as to sell liquors, peddlers, &c., are issued by the Clerk of said Council, who alone has the authority to issue licenses."

But the gist of the answer is that the sum of $250 required from plaintiff in error is simply a tax, which defendant in error is authorized by its charter to impose, and that the ordinance imposing it does not violate the Constitution of the United States by impairing the obligation of the contract plaintiff in error sets up.

In affirming the judgment of the Court of first instance refusing the injunction, the Supreme Court of the State of Georgia, handed down the following synopsis of points decided (*Record*, p. 17, § 51).

"1. A license is a right granted by some competent authority to do an act which, without such authority, would be illegal.

2. The tax called a 'license tax,' imposed by the City Council of Augusta, by the ordinance of January 5, 1874, upon foreign insurance companies doing business within the City, is a tax, and not a license.

3. The City Council of Augusta has power under the charter of the city to tax occupations, businesses, &c., and a foreign corporation which has an agency and a regular agent for the purpose of transacting its usual business within the City is liable to be taxed.

4. A tax on occupations, businesses, etc., is not, in legal contemplation, a tax on property, so as to be subject to the *ad valorem* and uniformity rules of taxation prescribed by the Constitution, and, therefore, a tax on fire insurance companies different from what is imposed on life insurance companies does not make the tax obnoxious to any constitutional requirement."

The first and fourth of these points are not in answer to any issues made in the pleadings. What a "license" is was not in controversy; nor was a question made as to the legal nature of a tax on occupations, and these points will, therefore, be passed by as general enunciations of law which require no special attention. The real decision is in the second and third points of the above syllabus, and the third point requires a word of explanation. From the wording it might seem as if plaintiff in error had asserted that the city could not call upon it to pay *any* tax, whereas it is distinctly set out in the record that under two other ordinances, one "to define the subjects of taxation in the city of Augusta," (*Record*, p. 10, § 31,) and the other "to fix the rate of taxation," (*Record*, p. 15, § 44,) plaintiff in error is called upon to pay the City Council of Augusta a tax for 1874 of 1⅓ per cent. upon its gross premiums, and pays it, (*Record*, p. 4, § 11,) which defendant in error admits. (*Record*, p. 7, § 22.)

So that this proceeding is not one in which plaintiff in error assails the taxing power, but, to the contrary, complies with the city ordinances which "define the subjects" and "fix the rate of taxation" therein. The third point

of the decision does not deny this compliance, but as it leaves the matter open to misconstruction, it has been thought proper to say this much.

ASSIGNMENT OF ERRORS.

In and upon the final judgment of the Supreme Court of the State of Georgia in this suit, plaintiff in error assigns error as follows, to wit:

1. That said Court erred in affirming the judgment of the Court below refusing the injunction prayed;

Whereas the Court should have reversed said judgment.

2. That said Court erred in deciding in favor of the validity of the ordinance of the City Council of Augusta, Georgia, entitled "An Ordinance to amend an ordinance entitled 'An Ordinance to assess and levy taxes for the support of the municipal government of Augusta, etc.,'" adopted January 5, 1874, such validity being before said Court drawn in question on the ground of the repugnancy of said ordinance to the Constitution of the United States;

Whereas said Court should have decided against the validity of said ordinance on said ground.

ARGUMENT.

This case coming up on a writ of error to a State Court the usual questions arise—

I. Has this Court jurisdiction; and

II. Should the judgment below be affirmed or reversed?

JURISDICTION.

I. HAS THIS COURT JURISDICTION?

It is submitted that this Court has jurisdiction for the following reasons:

1. An ordinance of a municipal corporation of a State is the exercise of an authority under that State, within Sec. 25, Judiciary Act of 1789, now § 709, Rev. Stats., U. S.

Weston v. *City Council of Charleston*, 2 Pet., 449.

And, consequently, this Court may, on a writ of error, re-examine and reverse or affirm a final judgment in any suit in the highest Court of a State in which a decision in the suit could be had where is drawn in question the validity of an ordinance of a municipal corporation of that State on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

Weston v. *City Council of Charleston*, 2 Pet., 449.
Osborne v. *Mobile*, 16 Wall., 479.
Cannon v. *New Orleans*, 20 Wall., 577.

In this case the validity of an ordinance of the City Council of Augusta, a municipal corporation of the State of Georgia, was drawn in question on the ground that it was repugnant to the Constitution of the United States and the final judgment of the Supreme Court of that State is in favor of its validity; and the jurisdiction of this Court therefore attaches.

2. The Court below passed upon the alleged repugnancy of this ordinance to the Constitution of the United States, and put its judgment on the ground that no such repugnancy existed.

In its opinion, to which this Court can *now* look, (*Murdock* v. *City of Memphis*, 20 Wall., 590,) the Court below states the case as follows, (Counsel inserting the word "such," because the record shows plaintiff in error actually paying a premium tax, and therefore not resisting any and all tax, as more fully stated on page 5 of this brief):

"—the objection is that the City Council cannot require complainant either to take out a license or to pay any [such] tax to the City; that having obtained the right to transact its business by the authority of the State, it is subject to no further liability either as a condition precedent to the exercise of such right or as [such] a tax upon it after it has engaged in such business." (*Record*, p. 23, § 70.)

—and then in proceeding to combat such a view, says:

"—If this be so, then the State would be equally bound by its own contract, &c., &c." (*Record*, p. 2, §72.)

—Thus expressly recognizing, at the very outset of its opinion, that the objection urged by plaintiff in error turns upon a question of impairment of the obligation of contract.

Plaintiff in error not only *in terms* impugns the validity of the ordinance in question, on the ground of the repugnancy thereof to the Constitution of the United States (*Record*, p. 3, § 9; p. 4, § 12), but by legal intendment repeats the same objection in a variety of ways, and particularly as follows, to wit: (*Record*, p. 3, §7.)

"That said City Council has no power to impose any tax on any incorporated company located, having an office, or doing business in said City of Augusta."

And— (*Record*, p. 3, § 8.)

"That said ordinance is in direct opposition to a general law of the State of Georgia, to wit: The insurance act

aforesaid, assuming to regulate in the City of Augusta in one way that which said general law regulates in another and different way throughout the State of Georgia."

As to the first of these objections, it will be noted that it is that the City Council of Augusta "has no power to impose any tax *on any incorporated company*," and not that the Council cannot require such a company to pay it any tax—the bill expressly declaring that plaintiff in error pays the tax of 1⅓ per cent. assessed upon its premiums by the Council for 1874. (*Record*, p. 4, § 11, p. 12, § 35, p. 15, § 44. The allegation is that the Council cannot tax *the company itself*, and the relevancy of this to a question of contract is that the settled construction, judicial and statutory, of the charter of Augusta at the time this contract was made was that the Council could not impose any tax upon a corporation within that city. This construction entered into and formed part of the contract whereby plaintiff in error obtained authority to do business in the State for and during the year 1874, and the ordinance in imposing a tax not imposable under such settled construction impairs the obligation of that contract.

The taxing power is conferred upon the City Council of Augusta by their charter, as passed in 1798, in these words: (*Marbury & Crawford's Dig. Ga. Laws*, p. 136–8.)

"—to make such assessments on the inhabitants of Augusta, or those who hold taxable property within the same, for the benefit, convenience, and advantage of the said city as shall appear to them expedient."

This is a power confined to "inhabitants" of, or "taxable property" within, the city.

City Council of Augusta v. *Ga. R. R. and Banking Co.*, 26 Ga., 651 (p. 663).

An incorporated company operating in the City of Augusta is not "taxable property" therein.

City Council of Augusta v. *Waltons, assignees Augusta Insurance and Banking Co.*, 37 Ga., 620.

An incorporated company is not an "inhabitant" in Georgia for the purposes of taxation.

Davis and Redding v. *Central R. R. and Banking Co.*, 17 Ga., 323 (pp. 328, 332).

Cherokee Insurance and Banking Co. v. *the Justices of Whitfield County*, 28 Ga., 121.

These are not simply *adjudications*. They are full bench decisions of the Supreme Court of the State of Georgia, and some peculiar legislation of that State, whereof more hereafter, makes all such decisions *statutes* of the State "as fully and to have the same effect as if the same had been enacted in terms by the General Assembly."

The operation in law is the same as if the General Assembly had passed "An act declaratory of the scope of the taxing power of the City Council of Augusta, Georgia, under the charter thereof," providing that such power does not extend to the imposition of any tax on an incorporated company operating therein.

The judgment now at bar reverses this settled construction, the Court below deciding:

"The City Council of Augusta has power, under the charter of the city, to tax [not only 'inhabitants' of, and 'taxable property' in, the same, but also] occupations, businesses, etc.; and a foreign corporation which has an agency and a regular agent for the purpose of transacting business within the city *is* liable to be taxed."

It is not claimed by the learned Court that the General Assembly has enlarged the scope of the taxing power of the City Council of Augusta—the alleged validating act of February 26, 1874, passing *sub silentio*, the Court expressly relying on the original charter of 1798 (*Record*, p. 24, § 73); but the Court, *ex mero motu*, changes the settled

construction in such a manner as to sustain the ordinance, the constitutionality whereof is impugned.

In such a case this Court has jurisdiction:

State Bank v. *Knoop*, 16 How., 369.
Jefferson Branch Bank v. *Skelley*, 1 Black, 436.
Hoboken Bridge Co., 1 Wall., 116.
Gelpcke v. *Dubuque*, 1 Wall., 176.
The Binghampton Bridge, 3 Wall., 51.
Havemeyer v. *Iowa County*, 3 Wall., 294.
Thompson v. *Lee County*, 3 Wall., 327.
Mitchell v. *Burlington*, 4 Wall., 270.
Larned v. *Burlington*, 4 Wall., 275.
Lee County v. *Rogers*, 7 Wall., 181.
Butz v. *Muscatine*, 8 Wall., 575.
Chicago v. *Sheldon*, 9 Wall., 50.
Kenosha v. *Lamson*, 9 Wall., 477.
Olcott v. *Supervisors*, 9 Wall., 678.
Township of Pine Grove v. *Talcott*, 19 Wall., 666.

The other objection: (*Record*, p. 3, § 8.)

"That said ordinance is in direct opposition to a general law of the State of Georgia, to wit: The insurance act aforesaid, assuming to regulate in the City of Augusta in one way that which said general law regulates in another and different way throughout the State of Georgia."

—Also, by legal intendment, asserts the repugnancy of the ordinance to the Constitution of the United States.

The insurance act is "An act to regulate insurance business and insurance agencies in the State of Georgia;" and after prescribing in its other sections the terms, on compliance with which an insurance company may obtain authority to do business in that State for a year, repeals, in its last section, all conflicting laws.

The rule is that a general State law, regulating any given matter in that State, repeals all local regulations, and revokes all local authority to prescribe regulations on

that subject, unless there be a special saving thereof in the statute.

People v. *Morris*, 13 Wend., 325.
Southport v. *Ogden*, 23 Conn., 128.
Burlington v. *Kellar*, 18 Iowa, 59.
Mayor of Knoxville v. Vickers, 3 Cold., 205.
Kellogg v. *Oshkosh*, 14 Wis., 623.

And this rule was announced in 1831 by all the judges of Georgia in convention—there being no Supreme Court until 1845—as applicable to the City Council of Augusta, the judges holding the jurisdiction of that Council confined to "such matters as are free from constitutional inhibition, *and have not been the subject of general legislation*; or, as it is expressed in the charter, are not 'repugnant to the Constitution or laws of the land.'"

Dubois v. *City Council of Augusta*, *Dudley's Rep.*, 32.

In fact, in Georgia, "the General Assembly cannot confer upon a corporation the power, by ordinance, to repeal a statute of the State. A by-law of a corporation, repugnant to the Constitution, common, or statute law of the State is void."

Haywood v. *Mayor and Aldermen of Savannah*, 12 *Ga.*, 404.

Nor can the General Assembly itself repeal a general law, *pro tanto*, the Constitution of Georgia, as adopted in 1868, providing, Art. I, Sec. 26:

"Laws shall have a general operation, and no general law, affecting private rights, shall be varied in any particular case, by special legislation, except with the free consent, in writing, of all persons to be affected thereby; and no person under legal disability to contract is capable of such free consent."

Code of Georgia, 1873, *p.* 907.

So that, even without its repealing clause, the Act of 1869 was a stipulation that the terms therein set out were *all* the terms wherewith an insurance company must comply, in order to obtain authority to do business in Georgia for a year.

The ordinance of the City Council of Augusta, of January 5, 1874, imposes new terms, and prescribes new regulations. Defendant in error says the reason the ordinance complained of was adopted, so far as it respects plaintiff in error, and like companies—(*Record, p.* 8.)

"— was because said companies are banded together under an organization, known as the Underwriters of Augusta, and arbitrarily fix the rates of insurance, and before the passage of said ordinance, by a mutual agreement among said companies, advanced the rates of insurance upon property in said city, from fifty to three hundred per cent."

As plaintiff in error, and other like companies, pay the City, as we have seen, a tax of $1\frac{1}{3}$ per cent. upon their gross premiums, it follows that the higher their rates the more revenue the City would derive from its tax upon their premiums. If the companies raised their rates "from fifty to three hundred per cent." the premium tax would increase "from fifty to three hundred per cent.," being an *ad valorem* rate of $1\frac{1}{3}$ on the gross premiums, whatever those premiums, *i. e.*, rates of insurance, might be. The ordinance in question, therefore, is clearly *not* a revenue or tax ordinance, its professed object being to *reduce* the rates of insurance, which would, of course, reduce the City's revenue from those rates, since the smaller the premiums taken the less the income from the tax of $1\frac{1}{3}$ per cent. thereon. Clearly, also, the ordinance *is* a regulative ordinance. Plaintiff in error has entered into organizations, of which defendant in error does not approve, and seen fit to fix a higher price on the commodity in which it deals—indemnity against loss by fire—than de-

fendant in error thinks it should; therefore, by the imposition of pecuniary penalties, defendant in error proposes to coerce plaintiff in error, and all other like companies, into doing business in conformity with *its* ideas. An ordinance of this sort is so clearly destructive to that right to do business which plaintiff in error has, by its contract with the State, that it is unnecessary to argue its repugnancy to the Constitution of the United States.

To give this Court jurisdiction, it is not necessary that the State Court should, in terms, say, we find no repugnancy to the Federal Constitution in this statute of, or authority exercised under, the State. It suffices if it distinctly appear that such a Federal question was raised, that it dominates the case, and that the judgment of the State Court is in favor of the validity of the State statute, or authority, so impugned.

And it is submitted that in this suit those requisites appear.

3. A third ground on which the jurisdiction is sustainable is that the final judgment of the Supreme Court of the State of Georgia, now here in this suit for review, is—being a full bench decision of that Court—a Statute of the State of Georgia, as fully, and to have the same effect, as if the same had been enacted in terms by the General Assembly thereof, and that such statute is repugnant to the Constitution of the United States, by impairing the obligation of the contract set up by plaintiff in error in this cause.

The Supreme Court of the State of Georgia consists of three Judges.

Const. Ga., Art. V, Sec. 2, *Sec.* 1, *Code of Georgia.* 1873, *p.* 917.

All three were present at, and concurred in, the final judgment of that Court in this suit.

(*Record, p.* 17, §50.)

In 1858, the General Assembly of the State of Georgia passed this Act. (*Ga. Laws*, 1858, pp. 74, 75.)

"An Act to make uniform the decisions of the Supreme Court of this State; to regulate the reversals of the same, and for other purposes.

SECTION 1. *Be it enacted*, That from and after the passage of this Act, the decisions of the Supreme Court of this State, which may have been heretofore, or which may hereafter be made by a full court, and in which all three of the Judges have [concurred] or may concur, shall not be reversed, overruled or changed; but the same is hereby declared to be, and shall be considered, regarded and observed by all the Courts of this State as, the law of this State, when it has not been changed by legislative enactment, as fully and to have the same effect, as if the same had been enacted in terms by the General Assembly.

SEC. 2. Repeals conflicting laws.

Approved, December 9, 1858."

Section 210 of the "Code of Georgia," as coming into force January 1, 1863, (*Ga. Laws*, 1861, p. 28) modified this Act thus:

"§210. A decision concurred in by three Judges cannot be reversed or materially changed, except by a full bench, and then after argument had, in which the decision by permission of the Court is expressly questioned and reviewed, and after such argument the Court in its decision shall state distinctly, whether it affirms, reverses, or changes such decision."

As so amended the Act of 1858 reads:

"The decisions of the Supreme Court of this State, which may have been heretofore, or which may hereafter be, made by a full court, and in which all three of the Judges have [concurred] or may concur, shall not be reversed, overruled, or changed, (except by a full bench, and then after argument had, in which the decision by permission of the Court is expressly questioned and reviewed, and after such argument the Court in its decision shall state distinctly whether it affirms, reverses, or changes

such decision ;) but the same is hereby declared to be, and shall be considered, regarded and observed by all the Courts of this State as, the law of this State, when it has not been changed by legislative enactment (or as above) as fully and to have the same effect, as if the same had been enacted in terms by the General Assembly."

§210 of the "Code of Georgia" appears *ipsissimis verbis* as §204 of "Irwin's Code," a revised edition published in 1867 of the "Code of Georgia," and the present Constitution of the State of Georgia, as adopted in 1868, in declaring the laws of general operation in force in that State, provides, Art. XI, sec. 3, that, in subordination to the Constitution, laws, and treaties of the United States and to this Constitution, those laws are:

"All acts passed by any legislative body, sitting in this State as such, since the 19th day of January, 1861, including that body of laws known as the Code of Georgia, and the Acts amendatory thereof or passed since that time, which said Code and Acts are embodied in the printed book known as 'Irwin's Code,' and also so much of the common and statute laws of England, and of the statute laws of Georgia as were in force in this State on the 19th day of December, 1860, as are not superseded by said Code, though not embodied therein, except so much of the said several statutes, Code, and laws as may be inconsistent with the supreme law herein recognized, or may have been passed in aid of the late rebellion against the United States, or may be obsolete, or may refer to persons held to slavery, which excepted laws are inoperative and void; and any future General Assembly shall be competent to alter or repeal (if not herein prohibited) any portion of the laws declared to be of force in this third specification of this clause of this Article."

Code of Georgia, 1873, p 927.

As neither the Act of 1858, nor §~~204~~ 210 of the Code of Georgia of 1863 (§~~210~~ 204 of "Irwin's Code") come within any of the prohibitions of the above, it results that the present Constitution of Georgia confirms and declares of

full force so much of the prior legislation of that State as declares that full bench decisions of the Supreme Court thereof are Statutes of the State "as fully and to have the same effect as if the same had been enacted in terms by the General Assembly."

It remains to add that in 1873 a third edition of the Code of Georgia, known as the "New Code," or the "Code of Georgia, 1873," was published and in this §~~204~~ 210 of the Code of Georgia of 1863 (§~~210~~ 204 of "Irwin's Code") appears *ipsissimis verbis* as §217. The side note to this section refers the reader to the Act of 1858. It is also the case that §1 of this New Code, entitled "*Laws of force in this State*" has this note: "Authority of decisions of the Supreme Court. See Acts of 1858, p. 75, and 28 Ga., 597, 30 Ga. 202, upon said Act."

This much has been adduced to show that the act of 1858 and its modification as in §~~204~~ 210 of the original Code of Georgia, have been carefully preserved in full force upon the statute book of that State.

It now remains to consider the adjudications of the Supreme Court of the State upon this peculiar legislation.

In *Bond* v. *Munro*, 28 Ga., 597, two questions arose on the Act of 1858: First, whether it is constitutional; and, second, whether it relates back and makes all full bench decisions rendered prior to its passage statutes from the date of such decisions; or is prospective only, making such decisions statutes from the time of the passage of the Act. The Court held that the operation of the Act on prior full bench decisions was to make those decisions "legislative enactments from and after the passage of the Statute, not from and after the date of the decisions," and this disposing of the case then at bar, the Court declined to consider the constitutionality of the Act. (P. 600.)

In *Lucas* v. *Lucas*, 30 Ga. 191 (1860), one of the points ruled was this: "That relief will be granted from a mistake as to the legal effect of an instrument is law, set-

tled by adjudications of this Court *and by statute*," and in so ruling the Court said:

"The principle of granting relief from a mistake as to the legal effect of an instrument is established by repeated adjudications of this Court *and by statute*. An act of 1858 (see Acts of that year, p. 74), in attempting to do several things does accomplish this: it converts into statutes, from the time of its passage all such decisions of this Court as had been made before its passage with the concurrence of a full bench. Now the case of *Wyche and Wife* v. *Greene*, in 11 Ga. Reps., 195, and again in 16 Ga. Reps., 42, had been decided by a unanimous full bench long before the passage of that Act; and the very point decided in it is the principle in question." (202.)

In *Russel* v. *Slaton*, 38 Ga., 195, decided in 1868, after the adoption of the present Constitution of Georgia:

Held: "The judgment of the Supreme Court, in a case, is a judgment affirming or reversing the judgment below, and is final and conclusive between the parties on the matters involved in that trial. The opinion of the Court on the law of the case does not stand on the same footing, and may be overruled, after argument, if shown to be erroneous, even if unanimous."

In ruling the point, the Court said:

"1. The judgment of affirmance or reversal by this Court of the judgment of the Court below, is not the subject of review. This is a Court of the last resort, and it would be an extraordinary law, indeed, that would justify such a review. Not that this Court is infallible, but that such a proceeding would be child's play.

2. Certainly the argument of the judge who writes out the reasons for the judgment, however false in logic or in fact, cannot be a ground for rehearing that case. If the *law* of the case is adjudged wrongly, the Code provides that the question of law may, on motion, be reheard; but until that is done, it is binding on the Court even for future cases." (198.)

It will thus be seen that the Supreme Court of Georgia at first (28 *Ga.*, 597) went no further than to say that, if constitutional, the Act of 1858 converted all prior full bench decisions of that Court into "legislative enactments from and after the passage of the Statute, not from and after the date of the decisions;" that it next (30 *Ga.*, 191) conceded that the Act *was* constitutional at least this far: "it converts into statutes from the time of its passage all such decisions of this Court as had been made before its passage with the concurrence of a full bench;" and, finally, (38 *Ga.*, 195) yielded the full measure of the Act by holding: "If the law of the case is adjudged wrongly, the Code provides that the question of law may, on motion, be re-heard, but until that is done, it is binding on the Court even for future cases."

Counsel has been thus minute, because this legislation is peculiar and presents a jurisdictional question which it is believed this Court has not as yet passed upon. The final judgment now in question being a statute of the State of Georgia, "as fully and to have the same effect as if the same had been enacted in terms by the General Assembly," it but remains to see if the other conditions of jurisdiction appear. Its validity has been drawn in question on the ground of repugnancy to the Constitution of the United States, or it would not be now here upon a writ of error; it imports its own validity, such repugnancy to the contrary notwithstanding; and it is here upon a writ of error issuing from the Supreme Court of the United States that "the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done" (*Record*, p. 18, § 57), and this gives jurisdiction.

It has been held that the final judgment of a State Court is not "an authority exercised under that State," within Section 25 of the Judiciary Act, now § 709, Rev. Stats. U. S.

Bethell v. *Demaret*, 10 Wall., 537

And that such a judgment, as a judgment, is not re-examinable here, as impairing the obligation of a contract.

Railroad Co. v. *Rock*, 4 Wall., 177.

Knox v. *Exchange Bank*, 12 Wall., 379.

But neither of these decisions conclude the present enquiry. The final judgment at bar is a Statute of the State "as fully and to have the same effect as if the same had been enacted in terms by the General Assembly."

In Swift *v.* Tyson, 16 Pet., 1, the meaning of the words "the laws of the several States," as occurring in the 34th section of the Judiciary Act (now § 721, Rev. Stats. U. S.) was considered, and, in delivering the opinion of the Court, Mr. Justice Story said:

"In the ordinary use of language, it will hardly be contended that the decisions of Courts constitute laws. They, are, at most, only evidence of what the laws are; and are not of themselves laws."

—But there is nothing in this incompatible with the Georgia statute that full bench decisions of the Supreme Court of that State are laws of the State "as fully and to have the same effect as if the same had been enacted in terms by the General Assembly." The statute is not the assumption of judicial power by the General Assmbly, though even if it were:

"There is nothing in the Constitution of the United States which forbids the legislature of a State to exercise judicial functions."

Satterlee v. *Matthewson*, 12 Pet., 280.

The distinction between the legislative and judicial power is that the former says what the law *shall be*, and

the latter what the law *is*—a distinction recognized both by the Supreme Court of the State of Georgia.

Wilder v. *Lumpkin*, 4 Ga., 208, (p. 212).
McLeod v. *Burroughs*, 9 Ga., 214.

—And by this court.

Ogden v. *Blackledge*, 2 Cr., 272.

—And this Georgia statute is entirely within the rule. It leaves the Supreme Court of that State free to say what the law *is* in any given case; but when that construction has been given, declares that *that* construction *shall be* the law in all future cases of like kind.

How the final judgment at bar impairs the obligation of that contract, whereby plaintiff in error received authority from the State of Georgia to do business therein for and during the year 1874, will better appear in the argument on the merits, but one striking particular may be mentioned. In 1865, the City Council of Augusta, Georgia, imposed a tax for that year of $1,000, United States currency, on every bank or insurance company in that city. The assignees of the Augusta Insurance and Banking Company resisted payment, and the Supreme Court of Georgia, on full bench, decided that the City Council *cannot*, under their charter, impose an annual and specific tax on incorporated companies in that city.

City Council of Augusta v. Waltons, Assignees of Augusta Insurance and Banking Co., 37 Ga., 620.

In the case at bar, the same Court decides that the Council *can*, under their charter, impose an annual and specific tax on incorporated companies in that city—"the *annual* license tax" of $250 on fire insurance companies being, if a tax at all, an annual and specific tax. The General Assembly has not changed the charter of the city, but the Court has changed the construction of the charter. Before plaintiff in error made its contract with

the State, the Court said: The City Council of Augusta cannot, under their charter, impose an annual or specific tax upon you. After the contract is made, it says: The Council has the very power which we assured you it did not have.

If a judgment only, this might be beyond the revisory power of this Court, but it is also a statute of the State of Georgia, "as fully and to have the same effect as if the same had been enacted in terms by the General Assembly." It is not simply a "wrong decision," but an unconstitutional law—and so justiciable here.

MERITS.

II. SHOULD THE JUDGMENT BELOW BE AFFIRMED OR REVERSED?

It is submitted that the judgment below should be reversed, for the following reasons:

This Court has held that a corporation created under the laws of one State has no right to enter and do business in another, except by the consent of such other State, which consent that State may condition at pleasure, provided, always, there be no infringement of the fundamental law of the Union.

Paul v. *Virginia*, 8 Wall., 168.
Ducat v. *Chicago*, 10 Wall., 410.
Liverpool Insurance Co. v. *Commonwealth of Massachusetts*, 10 Wall., 566.
Home Insurance Co. v. *Morse*, 20 Wall., 445.

And in the exercise of this authority, almost all the States have passed laws to provide the manner in which insurance companies of other States may do business within their borders. These statutes will be found collected in Wolford's General Insurance Statutes of the

United States; and having a common origin and purpose, present a close family resemblance. They usually provide that it shall not be lawful for any insurance company to do business in the State, except upon compliance with the terms prescribed in the act, which terms commonly are that the company shall prove its incorporation, and that its capital stock, assets, liabilities, etc., conform to a certain indicated standard. This done, it is agreed that authority to do business in the State for some limited period—generally a year—shall issue, at the end of which time there must be a new exhibit, and thereon a new grant of authority. Commonly, also, provision, express or by reference, is made that the company shall pay the State for the authority so granted, sometimes both a specific and an *ad valorem* tax, but more usually only an *ad valorem* tax, on premiums taken. Then there is the "reciprocal provision," whereby the company is to pay any excess in tax required from companies of the State where it seeks admission by the State whence the applicant comes. Thus, New York imposes a tax of 2 per cent. on the premiums of insurance companies of other States doing business in her borders; therefore New York companies operating in Georgia pay that State not only its proper tax of 1 per cent., but an additional 1 per cent. as a reciprocal tax—*i. e.*, the excess of the New York over the Georgia tax. And finally there is, ordinarily, an express repeal of all conflicting acts and parts of acts.

The Georgia insurance act does not differ materially from this model; and, so far as pertinent, is subjoined in full (*Ga. Laws* 1869, pp. 127–9), the side-notes being as they appear in the official edition of the laws.

"*An Act to Regulate Insurance Business and Insurance Agencies in the State of Georgia.*

Insurance companies must obtain license—how.

SECTION 1. *Be it enacted, etc.*, That it shall not be lawful for any insurance company, or agent of the same, excepting Masonic, Odd Fellows and Religious Mutual Aid Societies, already chartered by this State, to transact any business of insurance, without first procuring a certificate of authority from the Comptroller General of this State; and, before obtaining such certificate, such company must furnish the Comptroller General with a statement, under oath, specifying—

First. The name and locality of the company.

Second. The condition of such company on the thirty-first day of December, then next preceding, exhibiting the following facts and items, in the following form, namely:

[1st, capital stock; 2d, assets, detailed; 3d, liabilities, detailed; 4th, income preceding year, detailed; 5th, expenditures preceding year, detailed; 6th, greatest risk; 7th, certified copy of charter.]

Assets must amount to $100,000 before license issues.

SEC. 2. The said statement shall be filed in the office of the Comptroller General [and the company show possession of at least $100,000 cash capital.]

Comp. Gen. issues the license, when and to whom

SEC. 3. Upon filing such statement as aforesaid, the Comptroller General, when satisfied that the statement is correct, and that the company has fully complied with the provisions of this act, shall issue a certificate of authority to transact business of insurance in this State to the company applying for the same, and to all agents such company may appoint and commission.

Annual statements must be made.

SEC. 4. Said statement must be renewed annually on the first day of January in each year, or within sixty days thereafter; and if the Comptroller General is satisfied that the capital, securities and investments remain secured as at first, he shall furnish a renewal of the certificates. Insurance companies shall not be required to furnish but the single statement annually. The Comptroller General shall be entitled to a fee for examining and filing each statement of such companies of seven and one-half dol-

Fee of Comp. Gen.

lars, and for certificates to agents of two and one-half dollars, which fee shall be paid by the company or agent filing said statements, and to whom certificates are to be issued.

Additional liability of foreign insurance companies.

SEC. 5. [Whatever deposits, taxes, penalties, certificates or license fees are exacted from Georgia companies in any given State, shall be exacted of companies of that State in Georgia.]

Penalty for violating this act.

SEC. 6. That all persons violating the provisions of this act shall be liable to indictment, and, on conviction, shall be fined not less than one hundred dollars, nor more than five hundred dollars, at the discretion of the jury and court trying the same.

SEC. 7. That this act shall take effect on the first day of June next.

SEC. 8. Repeals conflicting laws.

Approved March 19, 1869."

Such being the statute, plaintiff in error's case, upon the merits, is this: That under the above act it received authority to do business in the State of Georgia for and during the year 1874; that the transaction, whereby it received that authority, is a contract between the State of Georgia and itself, and that the ordinance of the City Council of Augusta, Georgia, of January 5, 1874, impairs the obligation of that contract. Three questions hence arise:

1. Was plaintiff in error authorized to do business in Georgia for and during the year 1874?

2. Is the transaction, whereby it received that authority, a contract between it and the State? And—

3. Does the ordinance of the City Council of Augusta, of January 5, 1874, impair the obligation of that contract?

1. Plaintiff in error alleges in its bill the possession of authority under the above act to do business in the State of Georgia for and during the year 1874, and further alleges that under such authorization it has been doing business in the City of Augusta, Georgia, from January 1,

1874, up to the bringing of its bill, in April, in that year. (*Record*, p. 2, §5.) Defendant in error admits that plaintiff is and has been transacting business in the city, (*Record*, p. 7, §21,) and states further that prior to the passage of the ordinance in question, plaintiff in error was forming business associations and fixing rates of insurance therein, (*Record*, p. 8, §22,) but says, (*Record*, p. 7, §21):

"—whether said complainant has complied with said Act of the General Assembly of said State, approved March 19, 1869, and known as the Insurance Act, this respondent has no knowledge, information, or belief, except such as is set forth in said bill, and respondent prays that said complainant may be held to legal proof of said compliance."

It does not appear *in evidence* upon the record that plaintiff in error has the authority alleged in its bill, but it does appear that in pronouncing its judgment the court below said, (*Record*, p. 26, §78):

"The fact that complainant is a foreign corporation does not affect the question as to its liability to taxation. *It may contract in this State, sue here*, and the State could authorize it to hold real estate. (*Union Br. R. R. Co.* v. *E. T. & Ga. R. R. Co.*, 14 Ga., 327.) In the *Bank of Augusta* v. *Earle*, 13 Pet., 588, Taney, Ch. J., says: 'It is sufficient that its existence as an artificial person in the State of its creation is acknowledged and recognized by the law of the nation where the dealing takes place, and that it is permitted by the law of that place to exercise there the powers with which it is endowed.'"

Plaintiff in error could not "contract in this State" unless authorized under the above act of 1869 so to do.

It further appears from the record that the whole object of this proceeding is to restrain defendant in error from collecting from plaintiff in error a certain sum of money, and that the judgment complained of is that said sum is a tax upon plaintiff in error's business, which defendant in

error may lawfully assess and collect. If plaintiff in error is *not* authorized to do business as alleged, it has no business for defendant in error to tax, and there is no reason why the one party to the suit should require and the other resist the sum in question. The suit itself is the most conclusive evidence that plaintiff in error has the authority, without which the suit could not and would not have been instituted.

Two Georgia Courts, that of first instance and the Supreme Court, had defendant in error's doubt before them, and both passed upon the merits notwithstanding; in so doing affirming the existence of all the facts necessary to give them jurisdiction to so pass.

Grignon's Lessee v. *Astor et al.*, 2 How., 319.
Florentine v. *Barton*, 2 Wall., 210.
Comstock v. *Crawford*, 3 Wall., 396.

The recent case of Clay Fire and Marine Ins. Co. *v.* Huron Salt and Lumber Manufacturing Co., 31 Mich., 346, decided January T., 1875, is in point. There the lumber company sued the insurance company on a policy and obtained judgment. The declaration "complains of the Clay Fire and Marine Insurance Company, a corporation formed and existing under the laws of the State of Kentucky, defendant herein," and on the trial the insurance company objected to the introduction in evidence of the policy on this, among other grounds, "because no proof had been given of authority of such company to do business in this State." The Supreme Court said:

"The ground is not explicit, but we suppose the point intended was, that it was incumbent upon the plaintiff below, as a preliminary to the introduction of the policy, to show that the defendant insurance company, when it assumed to insure the property in question, and took from the assured the money for so doing, was not acting in plain derogation of our laws, and at the same time com-

mitting a gross fraud. The statement of the proposition conveys its own refutation. It was not admissible for the insurance company to insist upon a preliminary express showing that in insuring it acted honestly, and where it was lawful for it to act. *It was to be presumed, and certainly as against itself, in the absence of contrary proof, that in making the insurance it acted at a place where it would be lawful, rather than unlawful*, and in good, rather than bad faith. In saying this much, it is not admitted that the point could be maintained upon any reasonable theory, or any proper view of the facts, and it is not deemed needful to spend time in multiplying reasons against it." (Pp. 351-2.)

And so it is to be presumed, and certainly as against defendant in error, that plaintiff in error was authorized as alleged, particularly when the record shows plaintiff paying defendant a premium tax (*Record*, p. 4, § 11), and defendant claiming that its right to tax plaintiff was not exhausted thereby. (*Record*, p. 7, § 22.)

2. Is the transaction, whereby plaintiff in error obtained authority to do business in Georgia for and during the year 1874, a contract between it and the State?

In *Fletcher* v. *Peck*, 6 Cr., 87, the meaningof "contract" was determined.

In that case the Georgia Legislature, by act of January 7, 1795, provided that certain State lands should be sold to certain companies, among them "The Georgia Company," on compliance by them with certain conditions specified in the act. The companies complying, received grants of the lands promised; but by act of February 13, 1796, a succeeding Legislature declared the act of January 7, 1795, null and void—as having been passed by legislative fraud and corruption—and pronounced the grants made thereunder void. Certain grantees of "The Georgia Company" contesting the validity of this rescinding act, on the ground of its repugnance to so much of the Constitution of the United States as provides that no State

shall pass any law impairing the obligation of contracts, that provision came up for construction, and an analagous case arose to that presented now, viz.: Was the transaction between the State and the company under the act of January 7, 1795, a "contract" within the provision?

The Court held that the Act of 1795 was in itself an executory contract, (p. 136,) *i. e.*, an agreement by the State to do something for the Company, if the Company would comply with the conditions prescribed in the Act by the State; and that, when the Company had complied with those terms, and the State had done for the Company what it had promised, in that event, to do, the transaction was an executed contract between State and Company, within the meaning of the Constitution, and beyond the power of the State to alter or undo. (Ib., p. 136–9.)

Tested by these principles, the transaction by which the Home Insurance Company of New York obtained authority from the State of Georgia, under its Act of 1869, to transact the business of insurance in that State for the year 1874, is a "contract" between State and Company, within the meaning of the Constitutional provision cited. In its Act of 1869, the State promises to do something for the Company, on compliance with the conditions prescribed in the Act by the State. In 1874, the Company complies, and the State gives it for that year the authority promised. This is an executed contract, identical in principle with, though differing in form from, the contract, in Fletcher *v.* Peck. In that case, the Company was a real estate company, and the moving considerations were, to the Company, certain lands; to the State, certain moneys; divers pre-emption rights to citizens of Georgia; and the extinguishment of the Indian title at the Company's expense. In this case, the company is an Insurance Company, and the considerations are, to the Company, authority to do business in the State for a specified period, and to the State the public advantages arising from the

operations in the State, of a monied corporation coming up to the State's own standard of usefulness, solvency, and reliability.

"The word 'license' means permission or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purposes to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license."

Gibbons v. *Ogden*, 9 Wh., 563, (580.)
State Tonnage Tax Cases, 12 Wall., 204, (215.)

A license is a contract.

"LICENSE, *contracts*, is a right given by some competetent authority to do an act which, without such authority, would be illegal." *Bouvier L. D.*

And see:

Mayor, &c., of Rome, v. *Lumpkin*, 5 Ga., 447.
Chastain v. *Town Council of Calhoun*, 29 Ga., 333.
Adams v. *Mayor of Albany*, 29 Ga., 56.
Wood v. *City of Brooklyn*, 14 Barb., 425.
Martin v. *O'Brien*, 34 Miss., 21.
Leonard v. *City of Canton*, 35 Miss., 189.
Boyd & Jackson v. *The State*, 46 *Ala.*, 329.
Martin v. *O'Brien*, 34 *Miss.*, 21.
Philadelphia Association v. *Wood*, 39 *Penn. St.*, 73.

3. Does the ordinance of the City Council of Augusta, Georgia, of January 5, 1874, impair the obligation of that contract, whereby plaintiff in error obtained authority to do business in Georgia, for and during the year 1874?

To answer this we must first enquire if an ordinance of a municipal corporation of a State is within the prohibition: "No State shall pass any law impairing the obligation of contracts."

In a certain narrow sense, a "law" "passed" by a State is an act of the Legislature thereof, but such is not the Constitutional meaning.

A State Constitution is within the prohibition.

Jefferson Branch Bank v. *Skelley*, 1 Bl., 436.
Railroad Co. v. *McClure*, 10 Wall., 511.
White v. *Hart*, 13 Wall., 646.
Gunn v. *Barry*, 15 Wall., 610.

And so a municipal ordinance.

Weston v. *City Council of Charleston*, 2 Pet., 449.

This great case is always cited as establishing that the *States* cannot tax the financial operations of the United States, which it did, but the case did not arise upon a State law. The Legislature of South Carolina, declined to tax United States stock, as appears by a note to the case, but the City Council of Charleston adopted an ordinance to that effect and on this the question rose. In the Court below the ordinance was assailed as, 1st, impairing the obligation of the contract made by the government of the United States with the holder of its stock, and, 2d, as militating against the power of Congress to "borrow money on the credit of the United States," but was sustained, Huger, J., and three associates dissenting on both grounds. (*Harper's Reps.*, 219.) In this Court, Marshall, C. J., delivering the opinion, said; "The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution"—thus deciding a municipal ordinance in conflict with the Constitution of the United States, 1st, because impairing the obligation of contract, Art 1., sec. 10, cl. 1, and 2d, as militating against the power to borrow money on the credit of the United States. Art. 1, sec. 8, cl. 2.

If more were needed, the history of the provision is evidence that it comprehends every exercise of the legislative power of the States, whether in its highest form as framing a State Constitution, or in its lowest, as adopting a town by-law.

The Congress of the Confederation and the Federal Convention sat simultaneously in 1787. On the 27th of July the Congress adopted the famous Ordinance of 1787, which speaks of townships, counties, and villages then existing in the North-West Territory, and provides for "magistrates and other civil officers" therein as well as for a territorial legislature, and then stipulates certain articles of eternal compact, "the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said Territory;" among them, this:

"And in the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force in the said territory that shall, in any manner whatever, interfere with or affect private contracts or engagements *bona fide* and without fraud previously formed." (4 *Journ.*, 735.)

On the 28th of August following a rough draught of the Constitution being under discussion in the Federal Convention, "Mr. King moved to add, *in the words used in the ordinance establishing new States*, a prohibition on the States to interfere in private contracts" (*Madison Papers*). Mr. Madison favored the motion but it was lost. Subsequently Messrs. King and Madison and three others were appointed a commitee of final revision, and this committee reported a provision that "No State shall pass laws altering or impairing the obligation of contracts," which with a slight verbal change is the clause as it now stands.

The inference is that Mr. King and Mr. Madison finally succeeded in adding, if not "in the words used in the ordinance establishing new States," at least in the spirit thereof,

a prohibition: That no law ought ever to be made or have force in any State that shall in any manner whatever impair the obligation of contracts.

The degree of impairment is immaterial,

Green v. *Biddle*, 8 Wh., 1.

Bronson v. *McKinzie*, 1 H., 316.

Walker v. *Whitehead*, 16 Wall., 314.

And so the name or nature of the impairing act of legislation is immaterial, so long as it is an exercise of the legislative power of the State at all.

A State Constitution; an Ordinance or Resolution of a State Convention; an Act, Resolution, Vote, or Order of a State Legislature, or an ordinance, by-law, or resolution of a municipal corporation of a State are each and all "laws" of that State—*i. e.* exercises of the legislative power thereof—within the provision "No State shall pass any law impairing the obligation of contracts;" are equally forbidden to be passed, and when passed, are equally cognizable here.

Does the ordinance of the City Council of Augusta, Georgia, of January 5, 1874, impair the obligation of the contract relied on by plaintiff in error in this cause?

The ordinance requires plaintiff in error, as a fire insurance company doing business in the City of Augusta, Georgia, in the year 1874, to pay to the City Council of that city the sum of two hundred and fifty dollars ($250) as a "license tax" for that year, and the Court below adjudges that this is a tax on plaintiff in error's business, which the City Council of Augusta is empowered to impose under so much of their charter as authorizes them "to make such assessments on the *inhabitants* of Augusta" as may seem to them expedient. (*Record*, p. 24, § 73.)

If this be so, that ends the case, since it was part of the contract whereby plaintiff in error obtained authority from the State of Georgia to transact business therein for

and during the year 1874, that it should be subject to all taxes, State and municipal, which then were, or thereafter might be, requirable from it *according to law.*

It is now to be noted that the sum required by this ordinance is not a capitation tax, since by the Constitution of Georgia, as adopted in 1868, art. I, sec. 29:

"No poll tax shall be levied except for educational purposes, and such tax shall not exceed one dollar annually on each poll."

Nor is it a tax on property, since by the same Constitution, art. I, sec. 27:

"Taxation on property shall be *ad valorem* only, and uniform on all species of property taxed."

And, "this is now the fundamental law of the State in regard to the taxation of property, either by the State authorities or municipal corporations."

City Council of Augusta v. *National Bank of Augusta*, and *Same* v. *Planter's Loan and Savings Bank*, 47 *Ga.*, 562.

Nor is it an annual and specific tax on plaintiff in error as an incorporated company, since the city council of Augusta has no power under their charter to impose any such tax on any such company in that city.

City Council of Augusta v. *Waltons, Assignees Augusta Insurance and Banking Co.*, 37 Ga., 620.

Further, the "ordinance to *define the subjects* and regulate the mode of taxation, and the manner of returning the same in the city of Augusta," adopted in 1872, and continued in force for 1874, (*Record*, p. 10, § 31,) nowhere mentions that the business of insurance companies in Augusta in 1874 shall be a subject of taxation in that city in that year.

After enumerating a large number of such subjects, and among them the premiums of insurance companies not located in the city, it provides in its VI. section, (*Record*,

p. 12, § 36,) that "all [other] ordinances and parts of ordinances levying any tax * * * are continued in full force and effect, except the tax on property contained or included in the new tax digest, until the new rates of taxation are fixed." These new rates were fixed by the ordinance of March 31, 1873, "to fix the rate of taxation," (*Record*, p. 15, § 44,) and from that date all other taxes on any other subjects than those named in the ordinance to define the subjects of taxation in Augusta—if any such taxes there were, the record showing none—were abrogated, as of force for the year 1874, the ordinance to define the subjects of taxation in Augusta defined *all* such subjects, and the record shows that the business of insurance companies was among them.

The Court below adjudges, as stated, that the "license-tax," in question, is sustainable, because the City Council of Augusta are empowered, under their charter, "to make such assessments on the *inhabitants* of Augusta," as may, to them seem expedient, and plaintiff in error being an *inhabitant* of Augusta may be taxed under this power.

The answer is that the charter of the City Council of Augusta at the time this contract was made, distinctly set out and stated that a *corporation* operating in the City of Augusta, was not an *inhabitant* of that City. In 1835, (*Ga. Laws*, 1835, p. 31,) an act amendatory of the charter of Augusta was passed, the only relevant section whereof reads thus:

"SEC. 3. *And be it further enacted*, That from and after the passage of this Act, the City Council of Augusta shall have full power and authority to assess and tax property of every kind and description, situated, used or operated upon in said City, that may be owned by *individuals* or *corporations* residing or located out of said City; which assessments and taxes shall be made and collected in such manner as the said City Council have directed or shall direct by ordinance; and which assessments and taxes shall not in any case exceed the assessments and taxes on

like property in said city, owned by the *inhabitants thereof* or *corporations therein.*"

—Thus declaring in the clearest possible manner that a *corporation* is not an *inhabitant* in the purview of the charter. Moreover, it was, prior to the judgment now complained of, well-settled law in Georgia that a corporation was not an "*inhabitant*" in that State for purposes of taxation. In *Davis and Redding* v. *Central R. R. and Banking Co.*, 17 Ga., 323, Benning, J., delivering the opinion of the court, went deeply into the subject and said that the English rule to that effect (*Rex* v. *Gardner*, *Cowp.* 79; 2 *Inst.*, 703) never was law in Georgia, and continued:

"In the Statute of 1821 to authorize the Justices of the Inferior Courts to levy extraordinary taxes for county purposes, the State uses the word *inhabitants*, delaring that the Justices of the Inferior Courts shall have power 'to levy upon the inhabitants of any county in which the said Justices may reside, a tax, extraordinary of the general State tax' (*Cobb's Dig.*, 184), and yet this power, as far as I know and believe, has never been considered as authorizing the Justices of the Inferior Courts to tax banks, railroads, or other corporations, although it is a power that authorizes them to tax all '*inhabitants.*' Have banks and railroads ever paid tax under this power? * * * Never I think. If they never have, the inference is pretty strong that the word 'inhabitants' in this Statute was never intended to include corporations. The Statute is over thirty years old. * * * And if this be the interpretation which Georgia puts upon the word '*inhabitants*' in a tax Statute of her own the effect may, perhaps, be thought sufficient to overbalance the effect of the opposite interpretation which Lord Coke puts upon the word in the English Statute. And the notion that corporations have not been considered in Georgia inhabitants or residents of any particular place, derives support from the nature of several of her general tax laws. Thus the act of 1817, &c., the act of 1821, &c., the act of 1830, &c." (Pp. 330–2.)

In *Cherokee Insurance and Banking Co.* v. *The Justices*

of Whitfield Co., 28 Ga., 121, it was expressly decided that a corporation is not an "*inhabitant*" in Georgia for purposes of taxation. Under an act of 1821 empowering the inferior Courts of the various counties "to levy taxes for county purposes upon the *inhabitants* of any county in which said justices may reside," the defendant justices levied a tax on the capital stock of the plaintiff company. The Court said:

"Is this bank, as to its capital stock, an '*inhabitant*' of Whitfield County? That a corporation may be an inhabitant of a county for certain purposes, is admitted. Our judgment, however, is that a bank as to its capital stock is not an '*inhabitant*' of any particular county for the purposes of taxation, and though this act of 1821 has been in force for near forty years, it has never received this construction."

A contract made under such a settled construction can not be invalidated in this Court by a new construction precisely the reverse.

16 H., 369; 1 Bl., 436; 1 Wall., 116, 176; 3 Wall., 294, 327; 4 Wall., 270, 275; 7 Wall., 181; 8 Wall., 58, 575; 9 Wall., 50, 477, 678; 19 Wall., 666—*ut sup.*

It is patent on the face of the record that plaintiff in error is not an *inhabitant* of Augusta, Ga. The bill begins (*Record*, p. 4, § 5):

"Your orator, the Home Insurance Company of New York, brings this bill against the City Council of Augusta for injunction, and showeth that your orator is a private corporation, incorporated under the laws of the State of New York to transact the business of fire insurance."

And in *United States Express Co.* v. *Kountze Brothers*, 8 Wall., 342, held that "an averment that defendant is a foreign corporation, organized under the laws of another State, is a sufficient averment that the defendant is a citizen of such State," Mr. Justice Davis, delivering the opinion, saying:

"The citizenship of the defendant is clearly enough averred. It is alleged that the United States Express Company, the defendant in the suit, is a foreign corporation, formed under and created by the laws of the State of New York. The obvious meaning of this allegation is that the defendant is a citizen of the State of New York."

And so, in *Pennsylvania* v. *Quicksilver Mining Co.*, 10 Wall., 553, held that "a corporation is a citizen of the State in which it is created."

The very first requirement of the Georgia Insurance Act is that the Company seeking authority to do business thereunder shall state under oath "first the name and *locality* of the Company." (Sec. 1.) The Home Insurance Company *of New York* necessarily states under oath that it is *located in New York*, and yet with this necessity apparent on the face of the record, the judgment now here for review bases itself on the ground that such company is an *inhabitant* of Augusta, Georgia.

But the Court below relies, further, upon analogy, and says (*Record*, p. 24, § 72):

—"The legislature never thought that the regulation for insurance business and insurance companies, prescribed by the act of 1869, deprived it of the power of taxing such business or companies, *for it has uniformly since that time, as well as before, assessed a tax on both.*"

Counsel fully concedes that a surrender or limitation of the taxing power is never to be presumed but, with great respect, the learned Court below is greatly in error in its assertion that the General Assembly of Georgia has uniformly, since the Act of 1869, as well as before, assessed a tax *both on insurance and on insurance companies.* A more wholesale misapprehension of the annual tax acts could hardly be entertained.

Prior to 1858, foreign insurance companies operating in Georgia were not called upon to pay any tax to the State, but upon the Comptroller General representing the

anomaly of such exemption while home companies were required to pay tax, a provision was inserted in the tax act of that year (*Ga. Laws*, 1858, p. 103), requiring all such companies to pay a tax to the State for that year of one per cent. upon the gross amount of their premiums taken therein, and in each annual tax act from 1858 down to, and including that for 1874, foreign insurance companies doing business in Georgia have been called upon to pay that tax to the State *and none other*, the only exceptions in this period of eighteen years being 1866, when no tax whatever was required; 1867, when the tax was *two* per cent. to make up the omission of the preceding year; and 1862–5, when an income tax was imposed, but not collected.

Ga. Laws, 1858, p. 103; 1859, p. 71; 1860, p. 59; 1861, p. 76; 1862–3, p. 57; 1863–4, p. 80; 1864–5, pp. 22, 66; 1865–6, p. 253; 1866, p. 164; no legislature met in 1867; 1868, p. 152.

The nature of the annual tax acts from 1869, when the Insurance Act was adopted, to 1874, both inclusive, will be given more at large.

The tax act for 1869 (*Ga. Laws*, 1869, pp. 160–1) has this provision, and does not otherwise mention or refer to insurance companies:

SEC. 4. All home and foreign insurance companies, doing business in this State, shall pay one per cent. on all premiums in money or otherwise received by them: *Provided*, That when a home insurance company pays its tax on its capital stock it shall pay no tax on its premiums; and all agents of express companies from other States, doing business in this State, shall pay a tax of one per cent. on the gross amount of their receipts at their offices in this State, to be given in and paid as in succeeding sections; and that all domestic express companies and domestic insurance companies doing business in this State, pay an annual tax of one-half of one per cent. on their respective incomes: *Provided*, That the taxes assessed by the above

sections on insurance companies are subject to modification by subsequent legislation of this General Assembly."

Here the time-honored tax of one per cent. on all premiums received by them is the only tax required from foreign insurance companies doing business in Georgia, but there is an express reservation of the power of the General Assembly to impose at its pleasure any other and further tax.

For the years 1870 and 1871 no tax acts were specially enacted, the tax act of 1869 being extended thereto. (*Ga. Laws*, 1870, p. 506.)

The tax act for 1872, (*Ga. Laws*, pp. 276–7,) has this provision, and does not otherwise mention or refer to in surance companies:

"SEC. 4. All home and foreign insurance companies doing business in this State, shall pay one per cent. on all premiums in money or otherwise received by them: *Provided*, That when a home insurance company pays its tax on its capital stock, it shall pay no tax on its premiums; and all agents of express companies, from other States, doing business in this State, shall pay a tax of one per cent. on the gross amount of their receipts at their offices in this State, to be given in and paid as in succeeding sections; and that all domestic express companies doing business in this State, pay an annual tax of one-half of one per cent. on their respective incomes: *Provided*, That the taxes assessed by the above section on insurance companies are subject to modification by subsequent legislation of this General Assembly."

It is to be noted that this Act contains a further provision entitled to attention. It reads:

"SEC. 13. That all laws and parts of laws in conflict with this Act, *and all laws and parts of laws imposing any specific tax, whether in conflict with this Act or otherwise, be, and the same are hereby repealed.*"

As the Act provides in its second section "that the following specific taxes shall be levied and collected," naming

and numbering them up to thirteen, there being no reference therein to insurance companies or any other kind of corporation, the inference is that this Act intended to do away with any and every other specific tax, or authority to impose such taxes, throughout the State. Certainly, the language of repeal could not well be broader; "all laws and parts of laws imposing any specific tax, whether in conflict with this Act or otherwise."

The fourth section of the tax Act for 1873, (*Ga. Laws*, 1873, p. 66,) is *verbatim* with the fourth section of the tax Act for 1872, as just cited, and concludes with the usual proviso:

"*Provided*, That the taxes assessed by the above section on insurance companies are subject to modification by subsequent legislation of the General Assembly."

The tax act for 1873 does not otherwise mention or refer to insurance companies than as just stated.

The tax Act for 1874, (*Ga. Laws*, 1874, pp. 102–3,) has the following provisions, but does not otherwise mention or refer to insurance companies.

SEC. 2. That the following specific taxes shall be levied and collected * * * * upon each agent of any insurance company doing business in this State the sum of fifteen dollars."

"SEC. 4. That all home and foreign insurance companies doing business in this State shall pay one per cent. on all premiums in money or otherwise received by them, and in addition to the tax herein imposed upon gross receipts of insurance companies, all such companies, as well as all building and loan associations, and other companies or associations doing a banking or brokerage business in this State, such as discounting bills, drafts, or exchange, in the manner usual for banks, shall be taxed upon their capital in the same manner and at the same rate as herein provided for banks and bankers."

"SEC. 6. That the presidents of all banking companies, manufacturing companies, and other incorporated companies, other than railroad, *insurance*, telegraph, and express companies, shall be required to return all the property whatever of their respective companies, at its true market value—to be estimated at the aggregated value of the shares of stock—to the tax receiver of the county, where the same is located, or where the principal business of such company is located, to be taxed for State purposes and county purposes also, as other property in this State."

It will be seen that Sec. 2 imposes a specific tax on the agents of insurance companies, which tax is levied on, and counsel may add, paid by the agents themselves, and that Sec. 6 exempts the *property* of insurance companies from taxation. It will also be seen that the usual tax of one per cent. on premiums is required from foreign insurance companies, doing business in Georgia, and that those companies are required to pay in addition the usual tax on banks in case they carry on a banking, as well as an insurance business. And, lastly, it will be noted that the proviso, "That the taxes assessed by the above section, on insurance companies are subject to modification by subsequent legislation of the General Assembly;" which appears in every other tax act since 1869, the year in which the insurance act was passed, is omitted. That this omission is not accidental is shown by the fact that the proviso is also omitted in the tax act for 1875, (*Ga. Laws*, 1875, p. 116,) which imposes the customary annual tax of one per cent. on premiums and none other.

In *Murdock* v. *City of Memphis*, 20 Wall., 590, this Court considered the legal effect of the omission of one part of a statute in another statute which, but for the omission, re-enacts the first, and it was held that in such a case the omitted portion could not, by construction, be kept in force. And, see *United States* v. *Tynen*, 8 Wall., 88. Applying this principle to the case in hand, it follows that in re-enacting the customary annual tax of one per cent.

on the premiums of foreign insurance companies doing business in Georgia in the year 1874, but omitting the customary proviso that the Legislature might impose any other or further tax at pleasure, the tax act for 1874 means that foreign insurance companies, doing business in Georgia that year, shall pay the State a tax of one per cent. on their premiums but no other tax.

From this review, it will appear that the Court below was ill-advised in saying that the General Assembly of Georgia has uniformly, since the passage of the Insurance Act of 1869, as well as before that time, imposed a tax both on the business of insurance companies operating in Georgia, and on such companies themselves. To the contrary, it appears from the Acts cited, that but one tax to wit, one per cent. on premiums received, has ever been imposed by the State on foreign insurance companies. From legislation like this no analogy can be drawn to sustain the idea that the "license-tax" in question is a tax.

The Court below, however, refers to two authorities: *Mayor and Aldermen of Savannah* v. *Charlton*, 36 Ga., 460; and *Burch* v. *Mayor & Aldermen of Savannah*, 42 Ga,, 596. In the first it was held, that the municipal authorities of Savannah could not require Charlton, who had a license to practice medicine from the State, to take out and pay for a license from the City authorities, prior to practicing his profession therein, but that he was amenable to a tax upon his business as a physician; and in the second case, it was ruled that a retail dealer in liquor and wares must pay a tax on his business of selling wares as well as procure a license to retail liquor. In both cases the tax on business was sustained under so much of the charter of Savannah as vests the Mayor and Aldermen thereof— (Code of Georgia, 1873, § 4847.)

"—with full power and authority to make such assess-

ments and lay such taxes on [1] the inhabitants of the said City, and [2] those who hold taxable property within the same, and [3] *those who transact, or offer to transact business therein*, as said corporate authorities may deem expedient."

As this confers the power in terms upon Savannah to tax "those who transact, or offer to transact business therein," it is not surprising the decisions cited by the learned Court below should uphold such taxes, but certainly adjudications on this part of the Charter of Savannah are not in point in considering the Charter of Augusta, which vests the City Council thereof—

"With power and authority to make such assessments on [1] the inhabitants of Augusta, or [2] those who hold taxable property within the same, for the benefit, convenience, and advantage of the said city as shall appear to them expedient."

—and does not, therefore, contain the third power set out in the Savannah Charter, the power, namely, of taxing "those who transact or offer to transact business therein."

It cannot be contended, even under the decisions of the Court below, that the power "to make assessments on the inhabitants of Augusta" contains a power to tax occupations, since, if so, why the further power in the Savannah Charter to tax "those who transact, or offer to transact, business therein?"

But, it may be said there is a question in the record as to whether the IV. section of a certain Act of the General Assembly, of Georgia, of February 26, 1874, does not validate the ordinance in question. (*Record*, p. 4, § 12., p. 8, § 23.)

This is "An Act to authorize the City Council of Augusta to affix a penalty for failure to make tax returns or pay the same, and to enforce the collection of the same by execution," (*Ga. Laws*, 1874, p. 205,) and was passed be-

cause, in *Dunbar* v. *City Council of Augusta*, 50 Ga. 387, it had been ruled that under its original charter the Council did not have the power indicated in the title of the Act. Its fourth section reads thus:

IV. That all ordinances heretofore passed by said City Council of Augusta for the levying, assessing, and collecting any taxes for the support of said municipal government for the year 1874, be, and the same are hereby, declared to be of full force and effect until altered, changed, modified, amended, or repealed by said City Council.

As this section is to validate certain tax ordinances, and thereby impose taxes which did not legally exist before, it refers to a very different subject matter from that indicated in the title of the Act, namly, the collection of taxes generally, and is hence void by reason of that provision of the Constitution of Georgia which says, Art. III., sec. 4, § 5[illegible].

"Nor shall law nor ordinance pass which refers to more than one subject matter. *or contains matter different from what is expressed in the title thereof.*"

This latter prohibition has been in every Constitution of Georgia from, and including, that of 1798, and its scope and propriety have never been more broadly and powerfully sustained than by the very Judge who delivered the opinion in this cause in the Court below, ~~81 Ga. 371, 630~~. 49 Ga. 239 It will be noted that the Court below makes no reference whatever to this Act, and rests its judgment on the words of the Charter of Augusta as passed in 1798. (*Record*, p. 24, § 73.) That the section impairs the obligation of contract will also appear from the argument further on.

It is submitted that the "license-tax" in question in this cause cannot be sustained as a tax imposed or imposable by law upon plaintiff in error when making the contract set up herein.

Now, the *real* nature of the ordinance in question in this case is disclosed to us by the record. It requires plaintiff in error, as a fire insurance company doing business in that city in 1874 to pay to the City Council the sum of $250 as a "*license-tax*" for that year, and it states that the ordinance was adopted because, prior to its passage, plaintiff in error gave signs of an intention to conduct its business in the city that year in a manner not approved of by the City Council. Defendant's exact averment on this point is as follows: (*Record*, p. 8, § 22.)

"Respondent further answering, saith, that while respondent denies its liability to be called on for the reasons that induced any legislation by said Council, the increase in the tax upon said complainant and other like companies was not without reason, but was because said companies are banded together under an organization known as the Board of Underwriters, of Augusta, and arbitrarily fix the rates of insurance, and before the passage of said ordinance, by a mutual agreement among said companies, advanced the rates of insurance upon property in said city from fifty to three hundred per cent., and that considering the immense amounts paid to said companies yearly by the property owners of said city [said license-tax?] is not unreasonably or unjustly high."

Defendant in error here speaks of "the *increase* in the tax," &c., but the Record presents no trace of any prior "license tax" to be increased. The reference is perhaps, therefore, to "the annual and specific tax" of $100 on every insurance company in Augusta, as imposed by the ordinance "to fix the annual and specific taxes of the City of Augusta" (*Record*, p. 13, § 38); but *that* tax was void *ab initio*, it having been distinctly ruled that defendant in error could not, under its charter, impose any annual and specific tax on an insurance company operating in Augusta.

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Defendant in error may, therefore, simply mean that, as plaintiff in error was already subject to a tax on its premiums, this "license tax" was an increased or additional tax, and justifiable because of plaintiff in error's method of doing business.

Defendant also speaks of the immense amounts paid plaintiff in error and like companies in the city; but on these, defendant obtains a tax of $1\frac{1}{3}$ per cent. The greater the amounts paid for insurance, the larger the $1\frac{1}{3}$ per cent tax thereon; and, as has already been noted, as the professed object of this ordinance is to lower the rates of insurance—*i. e.*, premiums—it cannot be called a tax, or revenue, ordinance at all. It is simply an attempt to regulate a matter already fully regulated by the State, and to limit, condition, restrict and control the exercise in the city of a right secured plaintiff in error by contract with the State. Defendant in error proposes to keep plaintiff in error in check, by requiring it to take out a license annually, "which entitles it to carry on its business until the 31st of December next" (*See form of City Business License, Record*, p. 9, § 26); and, according to the opinion, defendant may have, from time to time of plaintiff's manner of doing business, its rates, its corporate associations, etc., etc., the "*license tax*" or sum of money required for such license, will be increased or reduced.

STATES have been brought in question at this bar, at the present term, as to whether they could regulate the rates that corporations operating within their borders may charge for their wares or services. The greatest lights of the profession have not agreed thereon. This Court has encouraged the amplest argument in the matter, and the decision is not yet. And yet a power which it is not yet adjudged whether even the States possess, and which, if they do possess, is only because they *are* States, is here claimed and exercised by a town council.

The ordinance in question imposes a "license tax," and in Georgia this means a license fee, or charge.

In Hotchkiss' *Codification of the Laws of Georgia*, a work published in 1845 under the auspices of the General Assembly, the term "license tax" is used to denote the sum required of auctioneers for license to do business in *Augusta*, St. Mary's, Darien, Savannah and Milledgeville, under an act of 1819. (P. 134, § 70.)

So, an act of 1852 empowers the officers of Lee County "to require a *license tax* of not less than two hundred dollars from all peddlers or itinerant traders, *to entitle them to trade within the limits of the said county.*" (*Ga. Laws*, 1851–2, p. 509.) And an act of 1857 makes it "the duty of the Justices of the Inferior Court of Worth County to require a *license tax* of not less than fifty dollars from all peddlers or itinerant traders, *to entitle them to trade* within the limits of the said county." (*Ga. Laws* 1857, p. 282.) An act of 1859 empowers the municipal authorities of the town of Perry to license the businesses of liquor sellers and auctioneers, and require "such sum or *tax* as they may deem right *for such license*" (*Ga. Laws* 1859, p. 192); and another act of the same year empowers the town authorities of Warrenton to require license from liquor retailers, and "levy such *tax* on said retailers as they may deem proper *for retailing spirituous liquors.*" (Ib., 214.)

Coming later, we read in the acts of 1872 that the town authorities of Trenton may "grant or refuse license to any person to retail spirituous liquors" therein, and "require such *license tax* as they may see proper from any person so licensed." (*Ga. Laws* 1872, p. 296.)

So, in 1874, the same year that this ordinance was adopted, the Legislature of Georgia passed an act empowering the town authorities of South Rome "to grant and regulate license to retail spirituous liquors," and charge therefor not to exceed $1,000 "per annum as a

license tax" (*Ga. Laws* 1874, p. 163); and an act giving the town authorities of Doraville "power to regulate, control and license the sale, by retail, of spirituous liquors" therein, and "fix the *license tax* for said sale." (Ib., p. 191.)

And so in other States. The Virginia insurance act (*Wolford*, p. 677,) provides for a tax on the premiums of every foreign insurance company doing business in that State, and says: "This tax shall be in addition to the *license* tax for the privilege of operating in this State."

And see:

State of Louisiana v. *Fosdick*, 21 La., Ann., 434.
Alexandra v. *Donnell*, 12 Kansas, 608.
Stein v. *Mayor of Mobile*, 49 Ala., 362.

And so in this Court:

Mc Culloch v. *Maryland*, 4 Wh., 316 (p. 436).
Brown v. *Maryland*, 12 Wh., 419 (p. 447).
Downham v. *City Council of Alexandria*, 10 Wall., 173.
Ward v. *Maryland*, 12 Wall., 430.
Osborne v. *Mobile*, 16 Wall., 479.

In the *License Tax Cases*, 5 Wall., 462, it was urged upon the Court, that on payment of the "*license tax*" imposed by act of Congress on sundry avocations, the party paying obtained authority to transact such business anywhere in the United States; and Chase, C. J., delivering the opinion, said it was a weighty argument that a license did give authority on the payment of the *license tax* charged therefor, such being the rule; but that this did not apply to cases arising under the Internal Revenue act of 1864, that act expressly saying that the license was to give no authority, and, therefore, none passed on payment of the *license tax*. The Court intimated that license and authority

were so inseparable that the use of "*license tax*" in that act was unfortunate, and expressed its satisfaction that in the latter act the term "specific tax" had been substituted.

In *Brown* v. *Maryland*, 12 Wh., 419, it was adjudged that when an importer buys the right to import by paying the prescribed customs dues, a State cannot require from him any sum of money as a condition precedent to the lawful exercise of the right secured him by his contract with the Government of the United States or as a burthen on such right. And the case at bar is that defendant in error cannot by its ordinance of January 5, 1874, limit, re-condition, burthen, or obstruct in any way the exercise in the City of Augusta, Ga., of the right to do business in the State of Georgia for and during the year 1874, secured plaintiff in error by its contract with that State under the Insurance Act thereof.

The authorities in point are numerous and express:

Under a State law regulating the liquor traffic L. and U. obtained a license to retail liquors for a year in Floyd county, in which the City of Rome is situate. Held that the city could not subsequently "impose and collect any additional tax, or impair the rights of the parties under the law as it stood at the time such license was granted," the Court saying defendants were "entitled to the full benefit of their contract under the law as it stood at the time they obtained their license to retail."

Mayor, &c., of Rome v. *Lumpkin et al.*, 5 Ga., 447.

A. obtained a license under the State law to retail liquor for a year in Dougherty County, wherein the town of Albany is situate, the statute placing no restriction as to where the buyer should drink the liquor, and the town authorities by ordinance forbade A. from selling liquor to be drunk on his premises. Held, that the ordinance was bad

as restricting A.'s rights under his license from the State.

Adams v. *Mayor of Albany*, 29 Ga., 56.

"A. took out a license from the State to retail spirits in Gordon county in November, 1858. In December thereafter the Legislature passed an Act empowering the Common Council of Calhoun, in said county, to levy and collect a tax, not less than one hundred dollars, upon any retail [liquor] establishment in that place. *Held*, that the statute was not intended to apply to one who had already paid the State for the privilege of retailing."

Chastain v. *Town Council of Calhoun*, 29 Ga., 333.

S. had a license under the State law to retail liquor in Taylor county, in which the town of Butler is situate, and by ordinance the authorities of that town called upon him to take out license to retail therein from *them*. Held, that the ordinance was void, the Court ruling: "The Courts will not infer that the Legislature intends to authorize a local departure from a general policy of the State, unless the local exception is expressed in specific terms."

Sanders v. *Town Commissioners of Butler*, 30 Ga., 679.

C. had a license from the State to practice medicine therein and the authorities of Savannah sought to compel him by ordinance to take out a license from them to practice his profession in that city. Held, that the ordinance was void, the Court saying the municipal authorities could not, under the name of a license, interfere with his right to practice in the city under his license from the State.

Mayor, &c., of Savannah v. *Charlton*, 36 Ga., 460.

A State law provided that on attaching a tag with the seller's name, &c., thereto, hay might be sold without inspection. The city of New York fined N. for selling hay

therein without inspection contrary to an ordinance thereof requiring the same. Held, that the ordinance was void, the Court saying of the provisions of the State law: "The corporation of the city of New York possess no power to repeal or supersede them."

Mayor, &c., of New York v. *Nichols*, 4 Hill, 209.

W., living in Brooklyn, obtained license under the State law to retail liquor for one year, the statute providing but one restriction, namely, that the licensee should not sell on Sunday to any but his guests or to actual travellers; and the municipal authorities of Brooklyn by ordinance forbade *any* selling of liquor in that city on that day. Held, bad, the Court saying of W.'s license, "He has a vested right to the privileges which it confers so long as it remains in force."

Wood v. *City of Brooklyn*, 14 Barb. 425.

The City of Mobile contracted with Stein for a water supply for a number of years, and subsequently called upon him to pay a license tax for a license to carry on that business in the city. Held, that the ordinance impaired the obligation of the contract and was void, the Court saying: "The ordinance which assails the privilege already granted impairs the contract on which it depends, and is void; and the tax levied under its authority, by way of license, cannot be supported."

Stein v. *Mayor, &c., of Mobile*, 49 Ala., 362.

In 1851 the City of New York granted the Second Av. R. R. Co. the right to operate a street railroad, and in 1858 passed an ordinance requiring the company to pay a license fee of $50 per annum for each car used. Held, bad, the Court saying: "It is the imposition of an annual tax upon the company, in derogation of its rights of property, and on that account is unlawful and void."

Mayor, &c., of New York v. *Second Av. R. R. Co.*, 32 N. Y., 261.

L. obtained a license under State law to sell liquors in the town of Canton for one year, and was compelled by the municipal authorities thereof to purchase a license from them. Held, that the money was recoverable, the Court saying: "His license, granted by the Board of Police, conferred upon him the right to enjoy the privilege therein granted without interruption from any source for one year. The Legislature having no authority to interfere with this right, it is almost unnecessary to say that a subordinate tribunal, deriving its power from the Legislature, could not do what the Legislature itself would not venture to do."

Leonard v. *City of Canton*, 35 Miss., 189.

The town of Shieldsborough was empowered by its charter to grant licenses for the keeping of wharves therein, and licensed M. to keep a wharf for a certain vicinage for a certain time, within which time the municipal authorities, by ordinance, granted licenses to others to keep wharfs in that vicinage. Held that the ordinance was void, the Court saying: "The ordinance annulling and amending the grant as it had been made by the previous ordinance to the appellant, and giving the license to the appellees to erect and keep a toll wharf within the limits embraced in the contract with appellant, was an act impairing the obligation of the appellant's contract, in violation of his vested rights under it, and therefore illegal and void."

Martin v. *O'Brien*, 34 Miss., 21.

A State Act conferred on B. and T. the right to operate a lottery therein for one year, they paying $2,000 therefor. The act was repealed before the expiration of the year and the licensees indicted. Held the indictments would not lie, the Court saying: "The defendants when they were indicted were acting under a license granted by

legislative authority. The repeal of the Act could not impair this right. It was the fruit of a contract, a vested right, which the State could not take away."

Boyd & Jackson v. *The State*, 46 *Ala.*, 329.

In 1857 the Royal Insurance Company obtained authority under the Pennsylvania Insurance Act to do business in that State for that year, and soon thereafter the Legislature passed an Act requiring every foreign insurance company doing business in Philadelphia to pay two per cent. on its premiums to a Fireman's Association in that city. Held, that the imposition was so extraordinary and of such doubtful constitutionality that the Courts would not lend themselves to enforce bonds given for the payment thereof.

Philadelphia Association v. *Wood*, 39 Penn., St. 73.

The charter of St. Paul, as passed in 1868, empowered the City Council thereof "to license and regulate insurance offices and insurance agencies," and a State act passed in 1872 to regulate insurance business in the State provided that foreign insurance companies, doing business therein, should pay the State two per cent. on their premiums "in lieu of all other taxes and licenses to be collected from said companies in this State:" and repealed all acts and parts of acts in conflict with said act. The city authorities called on P., doing business therein as an insurance agent under a license from the State, to take out a license to do business in the city from them, which he refused, relying on his compliance with the act of 1872. Held, that the act repealed the charter, *pro tanto*, not only by the provision that the two per cent. on premiums paid the State should be "in lieu of all other taxes and licenses" therein, but also by the general repealing section. This disposing of the case, the Court said it would not inquire into the constitutionality of the charter.

Prince v. *City of St. Paul*, 19 Minn., 267.

WHEREFORE, plaintiff in error prays that the judgment of the Supreme Court of the State of Georgia, affirming the judgment of the Superior Court of Richmond county, in said State, refusing the injunction prayed herein, be reversed.

SALEM DUTCHER,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

THE HOME INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,
vs.
THE CITY COUNCIL OF AUGUSTA, GA., DEFENDANT IN ERROR.

OCTOBER TERM, 1876.
No. 37.

In Error to the Supreme Court of the State of Georgia.

SUPPLEMENTARY BRIEF FOR PLAINTIFF IN ERROR.

The learned counsel for the defendant in error seems to misunderstand this case entirely. He says (Brief, p. 1):

"Taking advantage of the liberality of the legislation of Georgia, this company, through its agents, entered that State and did business, profitable to itself, of course, or it would not have continued in business there. After making large sums out of the citizens of the city of Augusta, the company, when called upon to pay a small tax for municipal purposes, enjoined the collection; and after judgment against it in the court below and by the supreme court of theState of Georgia, now comes and asks this court to relieve it from payment of the pitiful sum of two hundred and fifty dollars."

There was no particular liberality on the part of the State in authorizing the company to do business therein for 1874. It was a plain business transaction, of mutual advantage to State and company, and upon mutual considerations of value, the State profiting—first, by the revenue it receives in the shape of taxes paid by the company; and, secondly, by the benefits accruing to its citizens

from the presence in the State of a large moneyed corporation, up to the State's own standard of solvency and reliability; and the company profiting by the opportunity to make remunerative investment of its capital. The State says: Show me that you are safe and sound, and I will authorize you to do business within my borders for the year 1874. This is an executory contract. The company complies with the requisition, and receives in return the promised authority for the stipulated time. This is an executed contract, and gives the company a right to that authority for that time without interference from any quarter. On proceeding to do business under this authority in the city of Augusta, in Georgia, the company is called upon to pay that municipality a tax of one and one-third per cent. on its gross premiums taken therein for 1874, and complies without demur. It is proper that the city should have its revenue, and the company does not claim that exemption from taxation for revenue forms any part of its contract with the State. Then the city requires the company to pay it two hundred and fifty dollars as a "license tax" for 1874; and the occasion of this second exaction is stated to be that the company is not doing business in a way to suit the municipal authorities. Those authorities say the reason they adopted the ordinance imposing the "license tax," was because plaintiff in error, and other like companies—

—"Are banded together under an organization known as the Board of Underwriters of Augusta, and arbitrarily fix the rates of insurance, and before the passage of said ordinance, by a mutual agreement among said companies, advanced the rates of insurance upon property in said city from fifty to three hundred per cent." (Record, p. 8.)

If this be so, there is nothing in the laws of Georgia to forbid it. The State did not make it one of the conditions on which the company should receive its authority to do business in Georgia for 1874, that it should not enter

into such business associations as it saw fit, or charge such rates of insurance as it might deem proper. The company therefore objects to the imposition of new terms by the city. If the city can coerce it in the matter of its business associations, or of its rates, by a punitory "license tax" of two hundred and fifty dollars, it may raise the exaction at pleasure to two thousand five hundred dollars, or twenty-five thousand dollars, and thereby absolutely destroy in the city the right conferred upon the company by its contract with the State. The company therefore claims that the ordinance imposing the "license tax" impairs the obligation of that contract, and appeals to the courts against it. The supreme court of Georgia, however, upholds it as imposing a simple tax upon the company which it says the city is authorized by its charter to impose, and the company assigns this as error.

Such is the whole case. The company pays the State—*first*, a tax of one per cent. upon its premiums as required by the general tax act for 1874 (Ga. Laws, 1874, p. 102); and, secondly, a reciprocal tax, as it is called, of one per cent. additional on those premiums, as required by section 5 of the State Insurance Act. (Ga. Laws, 1869, p. 129.) It then pays the city a tax of one and one-third per cent. upon its premiums. (Record, folio 35.) To none of these taxes does the company object, each and all being simply and merely *taxes; i. e.*, sums of money required for the support of government, and for revenue purposes. But the "license tax" now resisted is not for revenue at all. The city says it is imposed because the company raised its rates from fifty to three hundred per cent. If this be so, then the city would receive from fifty to three hundred per cent. more revenue from the tax of one and one-third per cent. it lays on premiums taken by the company. If the city seeks *revenue*, it should encourage high rates of insurance, since the larger the premiums the greater the proceeds of a tax of one and one-third per cent. thereon.

But instead of encouraging higher rates—*i. e.*, more revenue—the object of the ordinance in question is to enforce lower rates; *i. e.*, less revenue. Revenue, therefore, is not the objective point of the ordinance. The object of the ordinance is to limit, restrict and recondition in the city a right conferred upon the company by contract with the State, and it is this which the company is resisting. It is not "fighting taxes," as the learned counsel seems to think, nor seeking to enjoin the collection of "a small *tax for municipal purposes*," as he imagines.

But he insists that the construction put upon this ordinance by the supreme court of Georgia concludes this court, and cites the well-known rule as to the State construction of State legislation. There are two exceptions to that rule, and this case is within them both. In the first place, this court will not—because it cannot, without a betrayal of the trust reposed in it by the Constitution—accept as final the construction put upon State legislation by the State courts in a suit wherein it is averred that such legislation impairs the obligation of contract. In such case, it will construe that legislation for itself. (*Jefferson Branch Bank vs. Skelly*, 1 *Bl.*, 436.) In this case the whole body and soul of the company's complaint is that the ordinance in question impairs the obligation of that contract between it and the State of Georgia, whereby it received authority from that State to do business therein for the year 1874. No one can read the bill without seeing that this question dominates and overshadows the whole case; and by reference to the opinion of the court below (Record, folio 71), it will be seen that that court, in speaking of what it deems the complainant's position, says, "if this be so, then the State would be equally bound by its own contract," &c., &c., showing that it clearly recognized that a question of contract was before it, and controlled the case.

Secondly, where a contract has been entered into under

a settled construction of State legislation this court will not accept as final a subsequent opposite construction which would invalidate the contract.

State Bank vs. *Knoop*, 16 *How.*, 396, *on pp.* 391–2; *Gelpcke* vs. *Dubuque*, 1 *Wall.*, 176, *on p.* 206; *Thompson* vs. *Lee Co.*, 3 *Wall.*, 327, *on p.* 331; *Havemeyer* vs. *Iowa Co.*, *Ib.* 294, *on p.* 303; *Mitchell* vs. *Burlington*, 4 *Wall.*, 270, *on p.* 274; *Lee Co.* vs. *Rogers*, 7 *Wall.*, 183; *Chicago* vs. *Sheldon*, 9 *Wall.*, 50, *on pp.* 55–6; *Olcott* vs. *Supervisors*, 16 *Wall.*, 678, *on p.* 690; *Township of Pine Grove* vs. *Talcott*, 19 *Wall.*, 666, *on p.* 678.

The case at bar is within this exception. Before the company made its contract with the State the Supreme Court of Georgia decided that this city had *no* authority under its charter to impose any annual and specific tax on an insurance company operating therein, and that an incorporated company was *not* in Georgia an "inhabitant" for purposes of taxation. (*City Council of Augusta* vs. *Waltons*, 37 *Ga.*, 620; *Davis* vs. *Central R. R. Co.*, 17 *Ga.*, 323, *on pp.* 328, 332; *Cherokee Ins. Co.* vs. *Justices of Whitfield County*, 28 *Ga.*, 121.)

Now, after the contract, it decides that an insurance company operating in Augusta *is* an "inhabitant" for purposes of taxation, and that the city *may*, under its charter, impose an annual and specific tax thereon; for, if a tax at all, this "license tax" is an annual and specific tax, specific because for a sum certain, to wit, $250, and annual because the ordinance imposing it styles it an "*annual* license tax." To sustain the ordinance in question as against the company's contract right, the court below—I say it with all respect—violently overturns the settled construction, settled by the judicial concurrence of a half century, of the laws of Georgia in this behalf. Further, upon the juri-dictional point; see brief for plaintiff in error, pages 7–22. Upon the merits, it is scarcely necessary to do more than refer to same brief, pages 28–

30 and 46–55; also Robinson *vs.* Mayor of Franklin, 1 Humph. (Tenn.), 156; City of Hannibal *vs.* Guyott, 18 Mo., 515; Orton *vs.* Brown, 35 Miss., 426; Mayor, &c., of N. Y. *vs.* Second Av. R. R. Co., 21 Howard Pr. Rep., (N. Y.) 257; S. C., 32 N. Y., 261; and affirmed in 33 N. Y., 42.

As to the act of the General Assembly of Georgia of February 26, 1874, validating the ordinance in question it is only necessary to say that the ordinance being in conflict with the Constitution of the United States no act could possibly cure that defect; as to the real object of the act, see brief, pages 44–45.

SALEM DUTCHER,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 37.

THE HOME INSURANCE CO. OF NEW YORK

vs.

THE CITY COUNCIL OF AUGUSTA, GA.

BRIEF FOR THE DEFENDANT IN ERROR.

By WILLIAM BROWN,

Attorney for Defendant in Error.

McGill & Witherow, Printers, 1107 E Street, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1876.

THE HOME INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF AUGUSTA, GEORGIA, DEFENDANT IN ERROR.

No. 37.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

The plaintiff in error in this action is one of the wealthiest corporations created by the State of New York, not authorized for any charitable or beneficent purpose, but brought into existence for the purpose of making money by the use of confederated capital. Taking advantage of the liberality of the legislation of Georgia, this company, through its agents, entered that State and did business, profitable to itself, of course, or it would not have continued in business there. After making large sums out of the citizens of the city of Augusta, the company, when called upon to pay a small tax for municipal purposes, enjoined the collection, and after judgment against it in the court below and by the Supreme Court of the State of Georgia, now comes and asks this court to relieve it

from payment of the pitiful sum of two hundred and fifty dollars. The soulless character of this wealthy corporation, and its disregard of the legislation of the States wherein it is permitted to do business, are exemplified not alone in this case, but in that of the "Insurance Company *v.* Morse," 20 Wallace, 445, wherein it is clearly shown this same plaintiff in error knowingly and wilfully violated its written agreement with the State of Wisconsin, and evaded performance through a technicality of the law. I do not believe I state the case too strongly when I say this court will be slow indeed in setting aside the judgment of the highest court in the State of Georgia; that would result in crippling the revenues of the municipalities, not only of Georgia, but of every State in the Union. This, too, not for any public good, but only to make richer and stronger a powerful and selfish corporation. By an unbroken line of precedents it has been established that "the construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

Leffingwell *v.* Warren, 2 Black, 603.
Shelby *v.* Guy, 11 Wheat., 351.
McClung *v.* Silliman, 3 Pet., 270.
Greene *v.* McNeil's Lessee, 6 Pet., 291.
Ross *v.* Duval, 13 Pet., 45.
Massingall *v.* Downs, 1 How., 767.
Nesmith *v.* Sheldon, 1 How., 812.
Van Rensselear *v.* Kearney, 11 How., 297.
Webster *v.* Cooper, 14 How., 504.

Again: "If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decision, this court will follow the latest-settled adjudication."

United States *v.* Morrison, 4 Pet., 124.
Greene *v.* McNeil's Lessee, 6 Pet., 291.

In United States *v.* Morrison, above cited, the Chief Justice, Marshall, delivering the opinion of the court, said: "This court, according to its uniform course, adopts that construction of the act which is made by the highest court of the State."

My reasons for calling the attention of the court to the authorities cited at this stage of my argument are patent. If the "ordinance" of the City Council of Augusta is in any sense a statute, and binding upon anybody or thing, then its construction by the Supreme Court of Georgia is binding upon this and all other Federal Courts in the United States.

It will be observed, in the citations above made, this court used the word "statute," and not the word "ordinance."

What is the difference? If either one or the other is considered by the Supreme Court of a State, and its legislative power judicially construed, that construction is binding on this court as much as the text of the ordinance or statute would be in the city or State creating them.

What is an ordinance?

"Where the proceeding consisted only of a petition from Parliament and an answer from the king, these were entered on the *Parliament roll*, and if the matter was of a public nature the whole was then styled an *ordinance;* if, however, the petition and answer were not only of a public but a novel nature, they were then formed into an *act* by the king, with the aid of his council and judges, and entered on the *statute* roll." (Bacon's Abridgement *Statute*, (*a*) Coke, Litt., 159 (*b*); Butler's note 3; Reeve's Hist. English Law, 146.)

According to Lord Coke, the difference between a statute and an ordinance is that the latter has not had the assent of the king, lords, and commons, but is made merely by two of these powers. (Coke, 4th Just., 25.) The word ordinance is defined by Worcester to mean "a law, an established rule, a decree." By common acceptation and usage in this country this word applies to the legislative or law-making acts of municipalities and corporations.

Now, the record, page 2, shows by the declaration of the plaintiff in error that the "City Council of Augusta is a municipal corporation created by and existing under the the laws of the State of Georgia."

This is a crude statement. If all the members of the council were to resign or die to-day, nevertheless, the "municipal corporation," known as the city of Augusta, Georgia, would continue to exist. Created long years ago by an act of the Legislature of Georgia, and with certain powers delegated to the city, the representatives of the people in council assembled, saw proper to tax plaintiff in error. The benefits of this taxation could be traced directly to plaintiff's door, for these taxes were for municipal purposes, to sustain a system of water works, fire companies and engines, to keep the streets in repair, &c., all of which redounded to the advantage of the plaintiff in case of fire in any building insured by them. It is now respectfully submitted to this court that all the allegations made by plaintiff that the "ordinance" of the city council of Augusta, as set forth in the record, pages 3 and 4, in the subdivisions of plaintiff's original bill, numbered 1, 2, 3, 5, 6, 7, 9, 10, 11, 12, and others referred to on pages 5 and 6 of the record, as well as plaintiff's amended bill, record, pages 8 and 9, is in any way violative of the Constitution and laws of the State of Georgia, must be rejected by this court, and the judgment of the Supreme Court of Georgia be affirmed. Every question has been settled by that court that it had authority to pass upon, and in pursuance of precedents in this court, as shown by the authorities heretofore cited in defendant's behalf, it is confidently assumed that the decision of the Georgia court will stand so far as it affects the Constitution, laws, or ordinances of that State. This leaves then only two questions to be decided by this court.

First. Has this court jurisdiction over this case?

Second. Was the ordinance of the city council of Georgia, requiring the Home Insurance Company of New York (and all other companies doing business in that city) to

pay two hundred and fifty dollars license tax (or any sum, for that matter) in violation of the Constitution of the United States?

As to the jurisdiction, this court held, in the case of the Tioga R. R. *v.* Blossburg and Corning R. R., (20th Wallace, 137,) wherein the error complained of was a construction given by the courts of New York, denying the right of a foreign corporation to avail itself of the statutes of limitations in that State, that "these decisions upon the construction of the statutes are binding upon this court, whatever it may think of their soundness on general principles."

Again, in the case of Murdock *v.* City of Memphis, (20th Wallace, 590,) this court held, "that it is essential to the jurisdiction of this court over the judgment or decree of a State court that it shall appear that one of the questions mentioned in the statute must have been raised and presented to the State court; that it must have been decided by the State court against the right claimed or asserted by the plaintiff in error under the Constitution, treaties, laws, or authority of the United States, or that such a decision was necessary to the judgment or decree rendered in the case." Let this ruling be applied to the case now under consideration. Plaintiff in error alleged in the original bill, (Record, page 3,) "that said ordinance is in restraint of trade;" that "said ordinance impairs the obligation of that contract between your orator and the State of Georgia whereby your orator, as aforesaid, has been and is authorized to transact the business of insurance in the State of Georgia, and thus violates so much of the Constitution of the United States as provides that no State, and, *a fortiori*, no political subdivision of a State, shall pass any laws impairing the obligation of contracts." Again, (Record, page 5,) plaintiff alleges "that said act in said section validates ordinances which impose penalties, and is thus an *ex post facto* act, and therefore in conflict with so much of the Constitution of the United States as provides that no State shall pass any *ex post facto* act."

These allegations contain all that was said, or possibly could have been said by the plaintiff that would, if brought in issue, give this court jurisdiction. But no such issue was made in the court below. The defendant in error denied none of plaintiff's assertions in such a way as would give this court jurisdiction. Defendant relied solely on its right, as a municipality in Georgia, to make plaintiff do something for the public good while making money out of the people of Georgia. Defendant relied on the constitutionality of its ordinance and upon the constitutionality of the act of the Legislature of Georgia approved February 26, 1874, confirming the ordinance complained of by plaintiff. (Record, page 8.)

Wherein does this plaintiff come under the rule laid down by this court in Murdock *v.* City of Memphis? The opinion of the Supreme Court of Georgia (Rec., p. 22 to 27) shows they decided this case on its merits, construing nothing but the law and Constitution of Georgia. Nowhere do they name the Constitution of the United States; nowhere do they deny plaintiff any right under it; nowhere do they assume to interfere with the undoubted right of the plaintiff, as a citizen of New York, to have sought directly the jurisdiction of the Federal courts in Georgia; nowhere does the Georgia court decide against the "right claimed or asserted by the plaintiff in error under the Constitution, treaties, laws, or authority of the United States." Plaintiff having totally failed to show this fact, it is confidently asserted, on behalf of the defendant, that this court has no jurisdiction in this case.

How can it be maintained that the imposition of the license tax of two hundred and fifty dollars upon the plaintiff was in violation of the Constitution of the United States? Plaintiff says it "is in restraint of trade."

The business of the plaintiff is that of insuring buildings and goods against loss or damage by fire. Whether this calling is a "trade" or not, is matter of doubt. Even if it is, there is nothing in the record to show that defendant restrained it in any way. This license tax was no more

a restraint than a tax upon a huckster, butcher, saloon-keeper, a billiard-room, or a hotel would have been. It is known to all the world that the United States internal revenue laws at one time provided for the payment of taxes or licenses by people following a great variety of occupations.

Hotel proprietors, distillers, stable keepers, lawyers, &c., were all taxed upon their occupations. Will this court hold that the tax of four hundred dollars required at one time of distillers was a restraint upon trade? Was the barrel tax, the grain tax, the deficiency tax, gaugers' and storekeepers' fees a restraint upon trade? Just as well might it be asserted that postage upon letters was such restraint as interfered with business and intellectual development, or that the cost of toll at a gate, or transportation by rail or vessel was an unconstitutional restraint upon trade. Plaintiff alleges the City Council of Augusta, in passing the ordinance complained of, impaired the obligation of the contract made by plaintiff with the State of Georgia. Was there ever a contract, express or implied? Defendant denies that a contract ever existed between plaintiff and Georgia. The record does not show it. What is commonly known as the "insurance act" of Georgia, passed March 19, 1869, gave plaintiff and other foreign corporations certain privileges in the State upon certain conditions, but no contract was provided for and none made, therefore no obligation was impaired by the defendant. After the flagrant violation of its contract with the State of Wisconsin this plaintiff should be very slow in accusing others of such an offense.

The defendant and the Supreme Court of Georgia have done plaintiff no wrong. States, cities, and courts have rights in this land as well as corporations, and I feel assured this court will do nothing to enlarge the power of corporations whose wealth, greed, and power already cause alarm and apprehension throughout the country. Fire and life insurance companies exist everywhere in the United States. Briareus-like, their arms reach every ham-

let. The record in this case, page 6, shows that nineteen insurance companies, representing many millions of dollars, are interested in the decision of this case. Seven of these companies were "incorporated under the laws of the United Kingdom of Great Britain and Ireland," and we are complacently informed (Record, page 6) "conference hath been had between all said companies and your orator touching the grievance common to all, as set forth in this bill, and by pursuance of common understanding had, your orator brings this bill."

The Legislature of Georgia could repeal to-day her insurance laws and drive these companies out of the State. It is a matter of State jurisdiction and State interest, with which the United States have nothing to do; and if these foreign corporations wish to enter the cities and villages of Georgia to do business, they should be compelled to comply with the laws and institutions of the State. It is rare that, even before this august tribunal, questions so important as those involved in this case are presented for consideration.

The action of the court will affect every community that derives any revenue from foreign corporations, thousands of dollars will be spent, and a vast amount of litigation must ensue, if the judgment of the Supreme Court of Georgia be not affirmed, for these companies will all sue for money they have heretofore paid in any State for license taxes.

Wherefore the defendant in error prays that the judgment of the Supreme Court of Georgia, affirming the judgment of the Superior Court of Richmond county in said State, be affirmed.

WILLIAM BROWN,
Attorney for Defendant in Error.

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